University of St. Thomas Law Journal

Volume 1
Issue 2 *Spring 2004*

Article 3

2004

# The Interface Between Globalisation, Corporate Responsibility, and the Legal Profession

Halina Ward

ARTICLE

# THE INTERFACE BETWEEN GLOBALISATION, CORPORATE RESPONSIBILITY, AND THE LEGAL PROFESSION

HALINA WARD[1]

## I. INTRODUCTION

This paper considers the consequences of addressing legal ethics through the lenses both of globalisation and of corporate responsibility. The interface between globalisation, corporate social responsibility (CSR), and legal ethics is important for a number of reasons. First, just as law and legal processes tend to have been underplayed in the contemporary corporate social responsibility agenda (notwithstanding their significance to it), so too has the role of lawyers. Second, both globalisation and corporate social responsibility form part of the context in which lawyers work. Lawyers are also distinct actors in both agendas. Yet whilst the consequences of globalisation for legal ethics are receiving increasing attention,[2] the consequences of the contemporary corporate social responsibility agenda for legal ethics have received almost none. This paper maps out the links; introduces some dilemmas at the intersection of legal ethics and corporate social responsibility; and provides pointers towards future efforts to integrate the two.

## II. LINKS BETWEEN GLOBALISATION AND CORPORATE SOCIAL RESPONSIBILITY

### A. *Corporate Social Responsibility*

There is no consensus on the meaning of the terms 'corporate social responsibility', 'corporate responsibility' (CR—increasingly the preferred

1. LL.B., LL.M., solicitor (non-practising). Halina Ward is director of the programme on Corporate Responsibility for Environment and Development (CRED) at the International Institute for Environment and Development in London.

2. *See* Andrew Boon & John Flood, *Globalization of Professional Ethics? The Significance of Lawyers' International Codes of Conduct*, 2 Leg. Ethics 29 (1999) (discussing attempts to establish international codes of ethics by bodies such as the International Bar Association).

term in the U.K. at least), or 'corporate citizenship.'[3] At heart, all definitions aim to drive forward understanding on the role of businesses as part of society—rather than somehow separate from it. The CR agenda is potentially both wider and deeper than the 'business ethics' agenda. The overall focus lies with the goal of maximising the positive contributions that businesses make to societal goals such as environmental protection, social justice, or maintenance of respect for human rights.

Commentators remain divided on the extent to which efforts to minimise the negative impacts that business activity can have on society belong within the corporate responsibility agenda, or whether they should instead be considered within a distinct 'corporate accountability' agenda. In this paper, the starting point is the broad view, namely that CSR or CR are at heart both about maximising the positive impacts or contributions of business activity to society, and minimising the negatives. The issues that lie within the agenda are encapsulated within the notion of 'sustainable development' and its focus on balancing economic, social, and environmental considerations.[4] Indeed, CSR or CR in this broad sense may be understood as synonymous with the 'business and sustainable development' agenda.

### *B. Globalisation*

The term 'globalisation' has been used in many different ways. At the highest level of generalization, it is sometimes taken to be synonymous with 'interconnectedness' or even 'capitalism.'[5] At its simplest, the key components can be understood as trade and investment liberalisation (associated with deregulation and privatisation)—collectively referred to as 'economic globalisation'—and the technological advances that transform communications.

The results of these processes of economic and technological globalisation have included significant shifts in the balance of public and private sector responsibilities around the world; governments finding that pressures to attract and sustain business investments make it difficult to implement new laws or regulations with negative competitive impacts; and increasing gaps between rich and poor people in some parts of the world.

---

3. *See e.g.* The Corporate Citizen, *Defining Corporate Citizenship*, http://www.uschamber.com/ccc/news/2004/aug-sep/0409letter.htm (Aug./Sept. 2004); International Institute for Sustainable Development, *Issue Briefing Note: Perceptions and Definitions of Social Responsibility*, http://www.iied.org/cred/pubs.html (May 2004).

4. *See* World Commission on Environment and Development, *Our Common Future* 8 (Oxford U. Press 1988) (classic working definition of sustainable development, defined as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs").

5. *See e.g. Economic Focus: Anti-Liberalism Old and New*, The Economist 92 (October 21, 2000). Capitalism would perhaps be better introduced as the "driving idea" of globalisation, as in Thomas Friedman's iconic and accessible work. *See* Thomas L. Friedman, *The Lexus and the Olive Tree* 8 (Farrar, Straus & Giroux 2000).

Globalisation of communication in turn has facilitated transnational organisation of civil society groups and organisations, making it easier to scrutinize business or government practices around the world. Today, when transnational businesses choose to adopt different environmental or social standards in their home countries than those that they apply in other countries, their activities and impacts are increasingly judged against the benchmark of home country standards.

### C. *Links between Corporate Social Responsibility and Globalisation*

The contemporary corporate social responsibility agenda emerged alongside the great debate of the 1990s over the nature and consequences of globalisation in all its forms. Alongside continued advocacy of trade and investment liberalisation, powerful evidence also began to emerge of circumstances in which the core strategies of economic globalisation had been associated with impoverishment and marginalisation of poor people and damage to the environment.

Who was to blame for these negative impacts? The dogma that accompanied trade and investment liberalisation, privatisation, and deregulation by multilateral institutions and governments in the countries of the Organisation for Economic Cooperation and Development (OECD) throughout the 1990s was that the potential benefits of market liberalisation would be realised *if* the right policies and practices were in place at the national level to distribute the benefits in ways that furthered social and environmental progress and equitable human development.[6] From this starting point, any negative consequences that flowed from liberalisation were not the primary fault of liberalisation *per se*, but of weak, or corrupt, or ineffective government policy. Policy prescriptions included capacity-building, institutional strengthening, and eradication of bribery and corruption.

At the same time, critics began to ask whether business lobbying behind the scenes might be preventing governments from adopting the right policies. Concern over the negative impacts of economic globalisation began increasingly to focus on the role of business—particularly big businesses—in lobbying governments to adopt investment-friendly policies without placing any matching emphasis on the need to develop and maintain strong environmental and social institutions, or to sustain the respect for human rights that could facilitate overall improvements in quality of life and progress towards sustainable development. Indeed, concern began to be raised that the economic power of big business, when expressed as political power, lay behind a 'race to the bottom' among some host countries, in which maintenance of low environmental or social standards, or in some

6. *See e.g.* General Agreement on Tariffs and Trade (GATT), Secretariat, *Trade and the Environment*, ch. 2 in *International Trade 1990-91*, vol. 1, available at http://www.ciesin.org/docs/008-082/008-082.html (Feb. 3, 1992).

cases even a lowering of standards could be applied as a strategy to attract foreign direct investment.[7]

*If* sustainable development could flow from economic globalisation when supported by appropriate policies and institutions at the domestic level, a number of strategies for responding to the potential mismatches might be deployed. One strategy might be to halt the processes of economic liberalisation—whether at the national, regional, or sectoral level—until such time as the right policies were in place, whilst investing simultaneously in building strong environmental, social, and human rights-based public sector institutions at the domestic level, and strengthening the political and institutional clout of environmental and social institutions at the international level. This approach can be seen for example in the advocacy of some civil society groups around the World Trade Organization (WTO) agenda.[8]

A second strategy might involve dismantling the current international economic architecture, rebuilding it so as to ensure that environmental, social, and human rights-based considerations became integrated directly within its institutions.[9] A third approach—reflected in the mainstream corporate social responsibility agenda—is to focus on the role that market actors—specifically businesses—can play *independently* of public sector actors to ensure that economic globalisation is supportive of social and environmental progress. It is this approach that is reflected in the mainstream CSR agenda.

No single initiative exemplifies the links between globalisation and corporate responsibility more clearly than the United Nations Global Compact,[10] launched at the personal initiative of UN Secretary-General Kofi Annan to a community of international business leaders at the Davos World Economic Forum in 1999. There, Secretary-General Annan called for a new compact of shared values and principles between the United Nations and the business community to give a human face to the global market. "Globalization is a fact of life," he began.

> But I believe we have underestimated its fragility. The problem is this. The spread of markets outpaces the ability of societies and their political systems to adjust to them, let alone to guide the course they take. History teaches us that such an imbalance be-

---

7. *See generally* Lyuba Zarsky, *Havens, Halos and Spaghetti: Untangling the Evidence about Foreign Direct Investment and the Environment*, in *Conference on Foreign Direct Investment and the Environment* (OECD 1999).

8. *See generally* Friends of the Earth International, http://www.foei.org/publications/cancun/index.html.

9. *See e.g.* Colin Hines, *Localisation: A Global Manifesto* (Earthscan 2000).

10. *See What Is the Global Compact?*, http://www.unglobalcompact.org; *select* About The GC (accessed July 26, 2004).

> tween the economic, social and political realms can never be sustained for very long.[11]

Whilst the links between the globalisation agenda and the contemporary corporate social responsibility agenda are undeniable, it might be argued today, given the increasing preoccupation with the war on terrorism and international security concerns, that making those links is no longer helpful in guiding business behaviour. Certainly, in the new political climate after the attacks of September 11, 2001, academic discussion on the relevance of globalisation as an organising concept for understanding relations across national boundaries appears to have subsided. Yet as Kofi Annan noted at the World Economic Forum meeting in Davos in January 2004,

> [i]n just a few short years, the prevailing atmosphere has shifted from belief in the near-inevitability of globalization to deep uncertainty about the very survival of our global order. This is a challenge for the United Nations.[12]

But it obliges the business community, too, to ask how it can help put things right. The corporate social responsibility agenda is as relevant in today's political environment as it was in the 1990s. And it is potentially just as relevant a response to the negative impacts of the contemporary political environment as to the negative impacts of economic globalisation.

## III. GLOBALISATION AND THE LEGAL PROFESSION

Law firms, and the legal profession, are also actors in the processes of economic globalisation.[13] Business lawyers help to generate the laws, the legally binding obligations, and the institutional architecture that underpin trade and investment liberalisation and privatisation. As one lawyer writes, exchange of capital and technology transfers are "legally intensive."[14] With 'internationalisation' of business transactions, businesses and their advisers turn to the best suited jurisdictions for the deals that they have in mind.

---

11. Press Release, Kofi Annan, *Secretary-General Proposes Global Compact on Human Rights, Labour, Environment*, http://www.un.org/News/Press/docs/1999/19990201.sgsm6881.html (Feb. 1, 1999). Later that same year, at the World Trade Organization's Seattle Ministerial Conference, demonstrators dubbed 'anti-globalisation' protestors took to the streets to air a variety of concerns over the impacts of further trade and investment liberalisation. The conference ended without meeting its aim of launching a new round of trade talks. *See* Halina Ward, *Trade Trouble*, The World Today 24-25 (Jan. 2000).

12. Kofi Annan, Address, *Special Address by Kofi Annan* (World Economic Forum, Jan. 23, 2004), available at http://www.weforum.org/site/homepublic.nsf/Content/Special+Address+Kofi+Annan.

13. *See generally* Special Issue, 23 Intl. Bus. Law. 509 (1995) [hereinafter *Intl. Bus. Law. Special Issue*] (a special issue on globalisation of the legal profession); Special Issue, 34 Vand. J. Transnatl. L. 897 (2001) [hereinafter *Vand. J. Special Issue*]; *e.g.* Steven Mark, *Harmonization or Homogenization? The Globalization of Law and Legal Ethics – An Australian Viewpoint*, in *id.*

14. John Crawford, *Why Do Law Firms Seek to Practise Globally?* in *Intl. Bus. Law. Special Issue*, *supra* n. 13, at 536.

Forum-shopping (or 'regulatory arbitrage') between different jurisdictions is common, with the legal profession in key practice areas acting as promoters of the dominance, or superiority, of their particular jurisdiction or mix of jurisdictions.[15] As businesses, international law firms stand to benefit from investment liberalisation[16] that helps them to establish new presences in other countries or to establish multinational partnerships.

Globalisation of legal businesses is at work in the intensified practise of public international law (for example, the law related to the WTO or the law of the 'home' jurisdiction in other countries); in the retraining of 'home' jurisdiction lawyers to practice the law of the local jurisdiction; in the hiring of local lawyers; or simply through engagement in commercial practice in one of a number of areas that are quintessentially 'international' in scope, such as international arbitration, intellectual property, or global project financing.[17] As professionals, increasing numbers of lawyers find themselves working in different jurisdictions to those where they trained, whether because they have followed existing client demand,[18] anticipated client demand in relation to underexploited jurisdictions,[19] or physically followed the establishment of new intergovernmental organisations or international treaty secretariats.

Together, these factors generate new influences for the evolution of commercial law—and new ethical challenges. As a new generation of 'globalised' lawyers spends long periods of time working away from their home country jurisdictions, some have pointed to "worrisome consequences for . . . their sense of obligation to adhere to professional rules and stan-

---

15. *See e.g.* Robert Briner, *Globalisation of the Lawyer*, in *Intl. Bus. Law. Special Issue*, *supra* n. 13, at 521, 522 ("One has also heard the opinion that many international contracts are governed either by English or New York law and that it is therefore essential but also sufficient to know these laws. . . . [I]t would seem to me that . . . this is mainly a public relations campaign by English and New York lawyers which is not borne out by the facts."); *cf.* William B. Matteson, *Building an International Practice*, in *Intl. Bus. Law. Special Issue*, *supra* n. 13, at 516, 518 (referring to a Fin. Times article which notes that the city of London still has 65-75% of Eurobond and international equity offerings).

16. *See generally* Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, in *Vand. J. Special Issue, supra* n. 13, at 989.

17. Matteson, *supra* n. 15, at 517-18. Public interest legal practices are also globalising, including through strategies that include networks and informal alliances and establishment of offices away from 'home countries.' *See e.g.* Interamerican Association for Environmental Defense, *About AIDA*, http://www.aida-americas.org/aida.php?page=about (accessed Oct. 26, 2004) (combination of network/membership coupled with a 'home' office in California); Environmental Law Alliance Worldwide, *About E-LAW*, http://www.elaw.org/about/ (accessed Oct. 26, 2004) (a multidisciplinary network of public interest attorneys, scientists and other advocates); EarthRights International, *About ERI*, http://www.earthrights.org/about.shtml (accessed Oct. 26, 2004) (offices in Washington and Thailand, with strategies combining litigation and campaign work).

18. John Flood, *The Globalising World*, in *Intl. Bus. Law. Special Issue*, *supra* n. 13, at 509, 511.

19. China or, following lifting of U.S. sanctions, Vietnam are examples. *See* Simon Ip, *International Strategies Adopted by Firms in the Asia Pacific Region*, in *Intl. Bus. Law. Special Issue*, *supra* n. 13, at 542-43.

dards."[20] One increasingly frequent response is likely to be the development of transnational or even universal standards of professional responsibility.[21]

Notwithstanding the major trend to globalisation of legal businesses and the practice of commercial law, it is striking that law understood through the lenses of government legislation and regulation has not 'globalised' overall at the same pace as the economy, business or communications. Institutions have struggled to catch up with the pace of change in the economy. There have been some significant developments: the establishment of an International Criminal Court; the development of a near-global intellectual property regime in the form of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights;[22] and the continuing evolution of multilateral frameworks for addressing environmental issues such as climate change. But the world is still very far from having achieved a system of 'global governance' through formal intergovernmental process.

The nature and sources of the norms that lawyers work with have also shifted with globalisation. New forms of 'soft' regulation generated by market actors acting in concert are burgeoning. Codes of conduct, labelling and certification schemes, and negotiated agreements are but a few of the body of instruments now in place to manage environmental and social issues. As normative instruments, these are also entering the lawyer's toolbox and forming an increasingly important part of business regulation.[23] Mapping and understanding networks of various kinds has become a key to

---

20. Deflev F. Vagts, *The Impact of Globalization on the Legal Profession*, in *The Internationalization of the Practice of Law* 31, 35 (Jens Drolshammer & Michael Pfeifer eds., Kluwer Law International 2001). *But cf.* Robert Briner, *Globalisation of the Lawyer*, in *Intl. Bus. Law. Special Issue*, *supra* n. 13, at 522 (who writes "I do not think that any particular ethical training is necessary for so-called international lawyers as opposed to other lawyers who are more domestically oriented").

21. *See e.g.* the materials cited in Christopher Whelan, *Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?*, in *Vand. J. Special Issue*, *supra* n. 13, at 931, 943-45 (which explores whether global self-regulation of the legal profession is desirable). The author concludes that global rules of professional responsibility based on core values will add value to private clients, but add little to the public interest. Whelan links the cultural dimensions of globalisation—which include exporting of English law—to the potential for the globalisation or export of a perception of the lawyer's role as entrepreneur, whose highest duty is to please clients.

22. Uruguay Round Agreement, *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* Annex 1C (Apr. 15, 1994), available at http://www.wto.org/english/docs_e/legal_e/03-fa_e.htm.

23. *See* John Braithwaite & Peter Drahos, *Global Business Regulation* (Cambridge U. Press 2000). In this seminal book, Drahos and Braithwaite argue that globalisation of business regulation has taken place through a messy process involving a web of actors—state and non-state—exerting influence at a variety of levels, and building 'global regulation' through a variety of tools and norms in a process of competing principles and models in which no single set of actors emerges as dominant. Drahos and Braithwaite's insights invite attention to non-legally-binding forms of regulation, to non-state actors, and to patterns of behaviour that are likely to prove strategically influential in the competition among norms and mechanisms. Their insights alone can be understood as a justification for lawyers to understand the 'voluntary instruments' of the corporate social responsibility agenda—though, as I argue below, there are risks in their doing so, both for other actors, and indeed for progress in the agenda as a whole.

unlocking an understanding both of commercial imperatives and of global governance more widely.[24]

As the economic pressures of globalisation have driven processes of deregulation around the world, so too globalisation has brought into sharp focus the complexities of social and environmental management in an increasingly interconnected world.[25] Chief among the remaining challenges is the task of making governable the activities and impacts of actors who organise their activities above and beyond the borders of territorial sovereignty.[26] Businesses are among these actors.

## IV. The Case for Bringing Law into the Corporate Social Responsibility Agenda

The corporate social responsibility agenda is often associated with a definitional dogma that is clearly reflected in a July 2002 Commission Communication—that corporate social responsibility is "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders *on a voluntary basis*."[27] The Communication goes on: "Despite the wide spectrum of approaches to CSR, there is large consensus on its main features [including that] CSR is behaviour by businesses over and above legal requirements, voluntarily adopted because businesses deem it to be in their long-term interest."[28]

There is a richness in the voluntary CSR agenda's emphasis on partnerships, on joint decision-making, and on voluntary discussion as a means

24. This applies to government networks at different levels as much as multi-stakeholder networks or single-actor networks of different kinds. *See* Anne-Marie Slaughter, *A New World Order* (Princeton U. Press 2004).

25. Indeed, at one point this led George Ball, formerly a U.S. under-secretary of state and U.N. representative, to make a radical proposal for 'denationalization' of transnational corporations [TNCs]. He argued that a supranational citizenship for TNCs should be provided by treaty, since, in his view, the pragmatic policy followed by TNCs of obeying local laws in each country where they operate would not resolve the "inherent conflict of interest between corporate managements that operate in the world economy and governments whose points of view are confined to the narrow national scene." Sol Picciotto, *Rights, Responsibilities and Regulation of International Business*, 42 Colum. J. Transnatl. L. 131, 133-34 (2003) (citing George W. Ball, *Cosmocorp: The Importance of Being Stateless*, 2 Colum. J. World Bus. 25, 28-29 (1967)).

26. In Mary Robinson's words, "[n]ow, in many areas, power has shifted from the public to the private, from national governments to multinational corporations and international organisations. This has resulted in a gap in accountability for human rights protection and an absence of transparency and broad public participation in critical policy decisions." Mary Robinson, Speech, *Human Rights, Development and Business – An Introduction* (Basel, Switzerland, Nov. 27, 2003), available at http://www.novartisfoundation.com/en/articles/human/symposium_human_rights/speeches/speech_robinson.htm.

27. Commission of the European Communities, *Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development* 3, http://europa.eu.int/comm/employment_social/soc-dial/csr/csr2002_en.pdf (July 2, 2002) (emphasis added).

28. *Id.* at 5.

to take forward collective understanding on improving business practices. Voluntary initiatives have the potential to express a crystallisation in emerging values more quickly and more flexibly than law is able. Indeed, there is much that lawyers can learn for their own practices from some of the values that underline approaches that have been adopted within the voluntary CSR agenda—particularly the values of transparency, partnership, and consensus-building dialogue, and consideration of the interests of all business stakeholders.

But it would be wrong to conclude from the definitional dogma that lawyers have little role to play in corporate social responsibility. Many lawyers themselves practise in firms—businesses—that are themselves potentially addressed by the corporate social responsibility agenda. And the dogma itself is unhelpful. Law needs to be recognised to have a more expansive role than that allowed within the 'voluntary only' definition of corporate social responsibility.

There are many reasons for adopting an approach to CSR that allows consideration of law. For present purposes it is sufficient simply to point to a few of them.

First, by focusing on a particular set of *tools* for addressing business responsibilities—those that are 'voluntary'—the 'voluntary only' definition of CSR focuses on responses to managing business impacts rather than the impacts themselves.

Second, the voluntary approach has a tendency to disconnect CSR from key issues of power that have informed much of the discourse about economic globalisation, taking for granted the institutions and laws associated with economic globalisation. To the extent that the 'voluntary' CSR agenda speaks directly to the economic globalisation agenda, it tends to do so by inviting further liberalisation or removal of regulatory burdens—such as discriminatory implementation of domestic tax laws in respect to large foreign investors[29]—so that competitive enterprise and effective economic globalisation are more effectively supported. From a response to the downsides of economic globalisation, corporate social responsibility then becomes a tool for furthering and strengthening the very starting points that have generated a status quo that corporate social responsibility is designed to change.

Third, the voluntary only definition of CSR tends to be associated with a focus on encouraging 'best practice' and innovation among businesses. It does little to contribute to the much-needed discussion on how the worst and most exploitative forms of business behaviour could be eradicated from the global economy.

29. For example, the business grouping 'Private Investors for Africa' has as one of its core themes the development of 'sustainable taxation models.' *See* Private Investors for Africa, *EMS Development Roundtable*, http://europa.eu.int/comm/enterprise/csr/documents/20030317/csrdevpiapps.pdf (Mar. 17, 2003).

Fourth, the business coverage of voluntary approaches to CSR is limited. A voluntary approach to CSR cannot hope directly to address all businesses, since market-based drivers of responsible business behaviour that take the form of consumer demand, or investor pressure, or campaign activity by non-governmental organisations, cannot reach all businesses in the same way.

Fifth, law and litigation are bringing new light to the CSR agenda in a variety of cases that test the boundaries of business responsibility. These cases—many of them transnational in scope—test the application of existing legal principles, such as civil liability, to some of the most difficult areas of the CSR agenda. One example involves investments by transnational corporations in host countries, such as Myanmar, the Niger Delta, or Sudan, associated with human rights abuses, violent conflict, or oppressive regimes.

Sixth, the voluntary tools of corporate social responsibility operate in a legal context. Once a code of conduct is adopted in a supply chain contract, it acquires legal status as a matter of contract. As mentioned above, the range of norms for business regulation—with which lawyers work—increasingly encompasses voluntary instruments such as labelling schemes or codes of conduct. The laws of defamation, misleading advertising, competition policy, and negligence already frame the voluntary CSR agenda.

Seventh, the voluntary CSR agenda is itself giving rise to new laws and legislation—particularly in the corporate governance arena and in relation to company reporting on environmental and social issues.[30]

Eighth, law and litigation have the potential to shape business reputations as responsible—or irresponsible—players and drive improvements in business practices or in engagement with external stakeholders.

Ninth, in many parts of the world, the notion of responsible business behaviour remains inextricably linked to the challenges of ensuring that businesses meet minimum legal requirements for environmental or labour protection, fair competition or corporate governance. Even-handed implementation and enforcement of minimum standards around the world is an essential precondition for creating a level playing field in which businesses can seek additional marketplace benefits by distinguishing themselves through voluntary action.

Once it is accepted that law forms an important tool of CSR, it becomes clear that the legal profession must play a part. Lawyers and the legal profession remain key guardians at the gateway to justice through the law. It is lawyers who remain principally responsible as agents for upholding the rights of citizens in the face of business transgressions, or for enforcing minimum baseline requirements of acceptable business behaviour

30. *See e.g.* the French example cited in Halina Ward, *Legal Issues in Corporate Citizenship* 4, http://www.iied.org/docs/cred/legalissues_corporate.pdf (Feb. 2003).

from a legal perspective. The legal profession is a lynchpin of the foundations of CSR. For all these reasons, it makes sense to adopt an approach to CSR in which law, litigation, and lawyers are accorded a significant place. Some of the issues that this raises for lawyers, and the profession as a whole, are outlined in the next section.

## V. Applying Corporate Social Responsibility to Law Firms as Businesses

Many law firms are themselves businesses. This fact is also an entry point for the argument that lawyers—and the legal profession—need to play a role in CSR.

When the CSR agenda is understood as a framework for minimising negative impacts of business activities whilst maximising their positive contribution, it calls for companies to pay attention to three core areas: managing the potential impacts—positive and negative—of core business operations including supply chain-related issues; social investment in the wider community; and enhancing the positive engagement of business in public policy processes.[31]

Applying this breakdown to lawyers and law firms might lead to a view of lawyers and the 'for-profit' legal profession essentially as 'corporates'—as business actors in their own right, and therefore audiences for and subjects of the corporate responsibility agenda.[32]

Lawyers are different from businesses driven by the need to maximise shareholder returns in some important ways. Businesses can only do what their constitutions allow them to do—which in most cases requires them to focus on shareholder returns. The consequence is that there needs to be a clear 'business case' for environmentally or socially responsible action. That 'business case' may result from the operation of a number of distinct drivers, including regulation, consumer demand, NGO pressure, or the need to attract and retain the best possible employees.

In contrast, lawyers can be understood as learned professionals pursuing a calling. The nature of the lawyer's function in society—however narrowly construed—is such that it is possible, indeed desirable, to make a case for the profession to maximise its contribution to CSR not simply on

31. Jane Nelson, *Building Competitiveness and Communities: How World Class Companies Are Creating Shareholder Value and Societal Value*, Prince of Wales Bus. Leaders Forum 30-79 (1998) (copy on file with author).

32. *See* Neil Hamilton, *Applying Business Ethics to the Law Firm*, Minn. Law. 2 (Dec. 16, 2002). This refers to Harris and Gallup polls indicating that the (presumably U.S.) public perceives the legal profession's public standing, honesty and ethics as 'virtually indistinguishable' from those of business. Professor Hamilton suggests that it is the competitive pressures of the marketplace that drive lawyers to see themselves as a business like any other, not a profession constraining self-interest in the service of justice. The piece seeks to apply key themes from the Minnesota Principles, http://www.cebcglobal.org/Publications/Principles/MN_PRIN.htm, to the practise of law as a business.

the individual business interests of law firms or their lawyers, but on the basis of the collective functions and roles exercised by the profession, and its overall calling.

Viewing law firms as businesses would indicate that law firms should consider taking action in three main areas. First, firms should address the direct impacts of their core business activities with a view to enhancing the positive contribution that the profession makes to sustainable development. Second, they should consider social investment in the wider community. Third, law firms should consider their role in public policy processes of relevance to their core competencies or areas of influence. Each area is considered briefly in turn below.

### A. *Lawyers and Core Business*

Two examples offer insights into the range of approaches that lawyers may choose to adopt in addressing CSR issues associated with their core business activities. The first is from South Africa, a country where a major plank in the national corporate responsibility agenda is black economic empowerment. This affects law firms both as businesses—since the legal profession itself lies within the ambit of legislation and notions of best practice on black economic empowerment—and as advisers, since law firms are involved in advising on financing mechanisms and corporate structuring to facilitate black economic empowerment—such as through the establishment of financial instruments to facilitate black ownership. In the third quarter of 2003, the South African magazine *Black Business Quarterly* carried three articles featuring the work of a number of South African commercial law firms in furthering the black economic empowerment agenda. It highlighted both the role of law firms as professional advisers on implementation of black economic empowerment within clients, and the strategies adopted by the individual firms for addressing their own internal black economic empowerment issues.[33]

A second approach is for lawyers to consider acquiring CSR advisory capacity in ways that help to maximise the potential positive contribution of business to sustainable development. For example, the website literature of the U.S. law firm Foley Hoag announces that:

> We help savvy business leaders limit their companies' risk by incorporating internationally recognized standards into their strategic planning, crisis response strategies, and relationships with stakeholders.[34] We help our clients succeed by providing them

33. *Black Economic Empowerment: The Professional Services Experience*, 4 Black Bus. Q. 46 (2003); Ellora Ghosh, *Synergistic Rainmakers, Working Together, Aligned in the Same Direction, Must Be Stronger than One or Two Larger-than-Life Individuals*, 4 Black Bus. Q. 49 (2003); *BEE Drives the Economy*, 4 Black Bus. Q. 52 (2003).

34. Foley Hoag LLP, *Corporate Social Responsibility: Practice Description*, http://www.foleyhoag.com/practice.asp?pID=000320864101 (accessed Oct. 28, 2004).

> with the information by which they can adopt risk-controlling, strategic business practices. Benefits of our advice include the reduction of threats to corporate reputation, the reduction of risks associated with the uncertainties of globalization, enhanced brand image, increased customer and employee loyalty and retention, and improved relationships with external stakeholders and public opinion leaders.[35]

### B. *Lawyers and Social Investment*

Like other businesses, lawyers could also consider developing social investment programmes to contribute to the progressive development of the communities in which they are based. This is familiar territory for many lawyers. For example, there are rules of professional conduct that exhort lawyers to carry out pro bono work.[36] But the potential contributions are wider than this. For example London based City law firm Linklaters has adopted a global community investment programme covering legal pro bono work, staff volunteering and charitable donations.[37] And the Swedish commercial law firm Vinge has established a programme to complement the Swedish Confederation of Industry's initiative on diversity for economic growth, working with five schools with the aim of inspiring young people with 'immigrant backgrounds' to attend law school.[38]

### C. *Lawyers as Advocates for Social Progress*

Businesses of all kinds, including law firms, are generally comfortable with the idea that lobbying public policy makers to uphold their commercial interests is an acceptable activity. Yet in those areas where broader public goods are at stake—such as in relation to environmental protection, social justice and poverty reduction, education, and upholding human rights, businesses are often reluctant to play a transparent public advocacy or lobbying role. In fact, business lobbying often undermines efforts to strengthen social or environmental protection.[39]

Viewed through the lens of the economic globalisation agenda this points attention to an uncomfortable dilemma: that whilst business lobbying helps to generate the trade and investment rules that underpin inequity in

---

35. Foley Hoag LLP, *Corporate Social Responsibility: Description*, http://www.foleyhoag.com/overview.asp?pID=000320864101 (accessed Oct. 28, 2004).

36. *See e.g.* Patrick R. Burns, *Pro Bono: It's Good and It's Good for You!*, http://www.courts.state.mn.us/lprb/fc99/fc041999.html (Apr. 19, 1999) (reprinted from Minn. Law.).

37. *See* Linklaters, *Who Cares?*, http://www.linklaters.com/pdfs/community/brochure.pdf?navigationid=222 (accessed Oct. 28, 2004).

38. *See* Press Release, Vinge, *Vinge Launches Diversity Project*, http://www.vinge.se/ templates/en/about/ShowNews.asp?a=132 (May 13, 2002).

39. Halina Ward & Bernice Lee, *Corporate Responsibility and the Future of the International Trade and Investment Agendas*, 1 IIED Persps. on Corp. Resp. for Env. & Dev. (Oct. 2003), available at http://www.iied.org/cred/pubs.html.

the impacts of economic globalisation, it is those same businesses who are invited to help to put a 'human face' on the global economy through the adoption of cutting-edge voluntary corporate responsibility practices.

Lawyers could play a positive advocacy role in public policy processes that touch on the sphere of influence of the legal profession. Far from advocating for the narrow interests of those that they represent, a social responsibility perspective might call for even business lawyers to advocate change in the law in those areas where it fails to ensure that business and sustainable development are mutually supportive.

The potential implications of lawyers adopting a social responsibility perspective are far reaching. For example, at its most contentious, this basis for social responsibility could call for business lawyers to think more carefully about the circumstances in which key principles of company law generate incentives to carry on business in ways that fail to maximise contributions to sustainable development.[40] For example, directors' fiduciary duties are owed principally to the company—usually defined as the shareholders present and future.[41] Consequently, the judgment of directors in areas of social or environmental responsibility is potentially vulnerable to challenge by shareholders where a clear 'business case' for socially or environmentally responsible action does not exist. The business case may be market-based—for example, as a result of the reputational considerations that flow from campaign pressure from non-governmental organisations; or the potential to recognise opportunities to innovate in the production of environmentally or socially progressive goods and services—or it can be provided by regulation or legislation.

Lawyers are also among the key actors in the maintenance of the principle of limited liability; a principle that can work to allow companies to externalise environmental and social costs through risk management strategies that include the establishment of undercapitalised subsidiaries charged with carrying out riskier parts of companies' operations. Activist lawyers sensitive to the issues at stake within the corporate social responsibility agenda might seek to expose and challenge some of the potential negative consequences that principles of company law can have for people or the environment.[42]

---

40. This idea is reflected in the so-called 'stakeholder' debate in the field of company law, which posits that directors should owe duties not only to the company but also to a range of external 'stakeholders.' For recent discussion in the U.K. context (ultimately rejected), *see e.g.* Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: The Strategic Framework* ch. 5.1 (Feb. 1999), available at http://www.dti.gov.uk/cld/comlawfw/.

41. *See e.g.* John H. Farrar & Brenda Hannigan, *Farrar's Company Law* 381-82 (4th ed., Butterworths 1998).

42. This is by no means to suggest that the principle of limited liability should be abandoned. Rather, there needs to be a more reflective discussion on the social and environmental costs associated with the maintenance of the principle of limited liability, and the circumstances in which alternative bases for liability—including corporate group liability—might have a role in allocating responsibility for 'worst case' environmental disasters or human rights abuses.

## VI. What Kind of Lawyers Does the Corporate Social Responsibility Agenda Need?

We need law firmly in the corporate social responsibility agenda. But what kind of lawyers do we need? As this paper has already shown, the CSR agenda itself points to a number of characteristics of the 'CSR-friendly' lawyer, including:

- absorbing the relevance of the 'voluntary' tools of CSR for their work;
- being equipped to maximise the positive contribution of their work to society—recognising that that task necessarily involves a number of delicate balancing acts—whilst minimising negatives;
- a willingness to act as advocates for social justice and environmental protection, within their spheres of influence.

The role of lawyers in society is also the domain of legal ethics. And both legal ethics and principles of professional conduct potentially have a significant role to play in aligning the work of the legal profession with the goals of CSR.

Already, the basic starting points for addressing the interface between CSR and the legal profession outlined above go further than the so-called 'standard conception' of legal ethics, according to which lawyers' ethics are based on two principles, namely:

1. The Principle of Neutrality: the lawyer may (and if no other lawyer is willing to represent a client *must*) represent people who wish to employ the lawyer's services regardless of the lawyer's opinion of the justice of the cause. In so doing however, the lawyer is absolved of any moral responsibility for acts done in the name of the client, and

2. The Principle of Partisanship: the lawyer is permitted and required to do everything to further the client's interests provided only that it is neither technically illegal nor a clear breach of a rule of conduct. The principle holds even when it clearly thwarts the aims of the substantive law.[43]

Happily, alternative conceptions of legal ethics go further than addressing simply the roles and responsibilities of lawyers in relation to the provision of legal services and address also the social context in which lawyers work, and arrangements for the delivery of legal services.[44] Drawing the sphere of legal ethics more widely in this way allows it to encompass concerns for access to justice, societal aspirations for law—as it relates to legal practice—and the social responsibilities of lawyers.

Taking this broader starting point for understanding the realm of legal ethics, the management of legal ethics focuses on the challenges inherent in arriving at a balancing act between two broad principles. The first is the

43. Richard O'Dair, *Legal Ethics: Text and Materials* 134 (Butterworths 2001).
44. *See generally id.* at 134-86.

principle of duty to the client that is often expressed as a duty to act in the best interests of the client, or to act zealously in the interests of the client, within the limits allowed by law. The second is reflected in the notion that the lawyer owes a wider duty to ensure that his or her practice reflects a commitment to the proper administration of justice and, indeed, to the institution of law.

Linking law to the CSR agenda brings with it an imperative to align notions of CSR with legal practice. But does maximising the legal profession's contribution to CSR call for changes in the principal vehicle for expressing legal ethics—namely rules of professional conduct? One way to address this issue is to look to those areas where there are potential tensions. It is beyond the scope of the paper to make detailed suggestions for changes in rules of professional conduct. But the remainder of this paper considers a range of areas where the intersection of CSR and the legal profession pose professional dilemmas that could usefully be addressed as issues of professional ethics. The focus throughout lies with two kinds of lawyers: lawyers working in private commercial practice and 'public interest' lawyers.[45]

## VII. Is There a Fundamental Clash of Cultures between the Practices of Commercial Law and CSR Respectively?

Those corporate lawyers who have so far engaged directly with the CSR agenda generally stress the potential benefits to their clients of engaging them in new CSR advisory roles. For example, two lawyers with Baker and Mackenzie, James Cameron and Sunwinder Mann, see "increasing convergence in what corporate lawyers and corporate citizenship teams are advising their clients."[46] They argue that, in the U.K. context, the enactment of the Human Rights Act—which incorporates the European Convention on Human Rights into U.K. Law—has created a legal culture in which "corporations can no longer ignore human rights issues in the running of their business." Cameron and Mann argue that:

> [T]he business lawyer has never advised his or her clients in a vacuum. Most, if not all, commercial clients expect their lawyers not only to advise on the legal position, but also to provide practi-

45. Public interest lawyers, whose practices are sometimes referred to as 'cause lawyering,' are those who commit themselves through their pursuit of legal practice to furthering social justice or a vision of a 'good' society. *See generally Cause Lawyering: Political Commitments and Professional Responsibilities* (Austin Sarat & Stuart Scheingold eds., Oxford U. Press 1998). Three core strategies deployed by public interest law firms have been identified as access to justice, law reform and political empowerment. *See* Thomas Hitchens & Jonathan Klaaren, *Public Interest Law Around the World: An NAACP-LDF Symposium Report* 4 (Julius L. Chambers et al. eds., Colum. Hum. Rights L. Rev. 1992).

46. James Cameron & Sunwinder Mann, Presentation, *Corporate Law and Corporate Responsibility—Meeting of the Minds or Miles Apart?* (The Royal Inst. of Intl. Affairs Conf. on Leg. Dimensions of Corp. Resp., Nov. 23, 2001) (copy on file with Royal Inst. of Intl. Affairs).

> cal advise on the commercial impact of a legal course of action they may choose to pursue. The litigation lawyer may advise his client not to pursue a contractual claim despite a strong legal claim. . . . The intellectual property lawyer may advise his multinational pharmaceutical client not to act against a third world country manufacturing cheap generic drugs in order to help fight disease even if this amounts to a violation of the client's patent rights.[47] The construction or property lawyer may advise his client not to develop a site in case this would have an adverse effect on either the environment or in case this would involve numerous people being displaced from their homes. The employment lawyer may advise his corporate client to settle a claim brought by an employee for sexual or racial harassment so that litigation and adverse publicity may be avoided . . . There is one fundamental reason why the business lawyer has already been providing practical commercial advice in addition to traditional legal advice – to guarantee the protection and integrity of the client's most valuable asset, its brand name and reputation.[48]

Nonetheless, non-lawyer practitioners of corporate social responsibility—particularly those with connection to jurisdictions in the United States—are sometimes prone to the view that lawyers hinder, rather than help, progress in the CSR agenda. In a 2001 presentation,[49] the late David Husselbee, who at the time was Global Director of Social and Environmental Affairs with Adidas-Salomon AG, pointed to some of the tensions between the overall characteristics of CSR, as distinct from legal approaches.

| CSR | Legal |
|---|---|
| Responsibility | Liability |
| Transparency | Confidentiality |
| Building Bridges | Cautious Defensiveness |

The optimistic view—that a 'good' lawyer will aim for integration between legal and reputational risk management—is not always borne out in practice. The legal profession has not played as much of a positive role in the CSR agenda as it might. A number of examples, highlighted in the following section, indicate that efforts to revisit the balance between core tenets of professional ethics could help to achieve a shift to a more positive contribution.

---

47. An example of precisely the opposite happening concerns litigation in South Africa by a large number of pharmaceutical companies over the constitutionality of provisions in the 1997 Medicines and Related Substance Control Amendment Act "on the grounds that they were in breach" of intellectual property law. "The legislation formed a key part of South Africa's response to the AID[S] pandemic, though its coverage was not limited to HIV/AIDS treatment drugs." The action was eventually withdrawn. Ward, *supra* n. 30, at 22-23.

48. Cameron & Mann, *supra* n. 46.

49. *See* Ward, *supra* n. 30, at 27.

## VIII. Lawyers Chilling Voluntary Approaches to Corporate Social Responsibility

There are a number of ways in which lawyers and legal advice can undermine or exert a 'chilling effect' on voluntary approaches designed to respond to contemporary demands for corporate social responsibility. Four specific examples follow.

### A. *The United Nations Global Compact*

Many critics of the Global Compact have focused on its voluntary, non-binding, nature—arguing that it does little to prevent 'bluewash'[50] and that company support for the ten Global Compact principles[51] should, at a minimum, be linked to third party processes to monitor company compliance with the principles. By way of contrast, there have also been anecdotal suggestions that levels of participation by U.S.-based companies in the U.N. Global Compact may have been held back as a result of advice from U.S. lawyers worried that claims of adherence to the Compact's nine principles—three labour, three environmental, and three human rights—could generate risks of litigation.[52] Indeed, there appears to be a concern within the U.N. to educate business lawyers to ensure that they are supportive of the efforts reflected in the U.N. Global Compact.

In January 2004, the U.N.'s legal counsel and Under-Secretary-General for Legal Affairs, Mr. Hans Corell, appealed to business lawyers at the 2004 Midwinter Council Meeting of the American Bar Assocation's Section of Business Law:

> You may ask: what is the role of corporate counsel in relation to the Compact? Let me take human rights as a point of departure even if the argument could be made equally for labour and the environment. Lawyers have a special responsibility in society. It is of particular importance that they are familiar with the international obligations that their country has undertaken at the international level, i.e. vis-à-vis other states, and contribute to the fulfilment of such obligations.

---

50. This is defined by CorpWatch as referring to "corporations that wrap themselves in the blue flag of the United Nations in order to associate themselves with UN themes of human rights, labor rights and environmental protection." CorpWatch, *Greenwash Fact Sheet*, "Other Forms of Greenwash," http://www.corpwatch.org/article.php?id=242 (Mar. 22, 2001).

51. The Global Compact was initially based on nine principles. A tenth principle addressing corruption was added in 2004. *See* United Nations, *The Ten Principles*, http://www.unglobalcompact.org/content/AboutTheGC/TheNinePrinciples/thenine.htm (accessed Oct. 26, 2004).

52. Though this has not prevented a handful of law firms from participating, such as Allens Arthur Robinson; Amaro, Stuber e Advogados Associados S/C; Bufete Jurídico Sapena Soler Borras; Bunag Kapunan Migallos & Perez; and Roco Kapunan Migallos Perez & Luna Law Offices. One, a leading Australian commercial law firm, Allens Arthur Robinson, has submitted an example of what it is doing to implement the Global Compact Principles within its own firm to the Compact Secretariat. E-mail from Ursula Wynhoven, Global Compact Secretariat (Feb. 26, 2004) (on file with author).

> You will of course counter and maintain that your main responsibility is to your client. This is correct, but the two responsibilities may not necessarily be in conflict with each other. On the contrary! The matters that the Compact focuses on are often given prominent attention in the media and public discussion. Ultimately, companies will be assessed by public opinion, and as we know the agenda for the debate is here often set by non-governmental organizations. It is therefore important that companies that are proactive in this field also act in their own interest.[53]

Mr. Corell stressed the voluntary nature of the Compact and his belief that companies would not be held accountable if they failed to meet the standards of the Compact. The Global Compact Secretariat itself stresses that participation in the Compact does not bring legal consequences. A 'common questions' document prepared by the Secretariat emphasises that:

> Support for the Global Compact initiative does not call for an expression of intent to legally bind the company or to create a duty towards third parties.
>
> As the initial step for participation by a company in the Global Compact initiative, a company has to send a letter to the UN Secretary-General, signed by the Chief Executive Officer and possibly endorsed by the board, expressing support for the principles of the Global Compact. The statement is an aspirational commitment rather than a commitment "to comply with the principles" or to "meet the objectives." The large number of letters from companies, including leading US companies, that the Secretary-General has received, shows that corporations have fully understood and internalized this concept.
>
> While participating companies are expected to publicly advocate the Global Compact and its principles in company press releases or speeches, they are not required to comment on their specific actions with regard to the Global Compact principles in these public communications. Thus, such statements do not raise issues of legal liability regarding the company's compliance with the principles it has publicly endorsed – as is the case in current judicial review.
>
> Companies are only expected to describe the ways in which they are supporting the Global Compact and its nine principles in their annual reports or similar corporate reports, i.e. documents whose accuracy is mandated by law. Thus, a company will not be subject to a greater risk of liability by including a description of the corporate practices related to the Global Compact principles.

---

53. Hans Corell, Speech, *The Business Lawyer and International Law: Reflections on the Lawyer's Role with Respect to Teaching of International Law, the Global Compact and International Trade Law* (Santa Barbara, Cal., Jan. 17, 2004), available at http://www.unglobalcompact.org/irj/servlet/prt/portal/prtroot/com.sapportals.km.docs/ungc_html_content/NewsDocs/Corell.pdf.

> During three years of operation of the Global Compact, there has not been any indication that participating companies have been exposed to a greater risk of liability.[54]

More recently, the Global Compact Secretariat has worked directly with the American Bar Association to develop a model letter that U.S. based companies can use to sign on to the Global Compact.[55]

### *B. Legalisation of the OECD Guidelines for Multinational Enterprises*

The principal inter-governmentally agreed instrument for securing corporate accountability through a non-legally binding mechanism is the OECD Guidelines for Multinational Enterprises.[56] The Guidelines were initially agreed in 1976, with negotiations on the most recent revisions to the Guidelines concluded in 2000. They contain voluntary principles and standards for responsible business conduct, including human rights, labour, environment, and taxation.

The OECD Guidelines do not directly bind enterprises, but their force for businesses lies in the political agreement of the OECD member countries, together with an additional group of eight[57] non-OECD countries that have indicated their intention to adhere to them; to establish 'National Contact Points' (NCPs) to make the Guidelines known; to disseminate them; to respond to enquiries about the Guidelines; and to report annually to the OECD's Committee on Investment and Multinational Enterprises (CIME) on its activities.[58] Importantly, NCPs are also charged with contributing

> to the resolution of issues that arise relating to implementation of the Guidelines in specific instances. The NCP will offer a forum for discussion and assist the business community, employee organisations and other parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law.[59]

---

54. *Common Questions Regarding the Global Compact* (on file with author).

55. *See* Press Release, United Nations, *ABA Business Section Approves Letter for U.S. Firms*, http://www.unglobalcompact.org; *select* News & Events (Mar. 25, 2004) (noting that "[t]he leadership of the ABA Business Law Section expressed their hope that the letter, with its emphasis on the voluntary nature of the Global Compact, will allay legal-oriented concerns to U.S. corporations joining the Global Compact").

56. Organisation for Economic Co-operation and Development, *The OECD Guidelines for Multinational Enterprises: Revision 2000*, http://www.oecd.org/dataoecd/56/36/1922428.pdf (2000).

57. *See* Organisation for Economic Co-operation and Development, *The OECD Guidelines for Multinational Enterprises: A Key Corporate Responsibility Instrument*, http://www.oecd.org/dataoecd/52/38/2958609.pdf (June 2003) (for a general introduction).

58. Organisation for Economic Co-operation and Development, *Decision on the OECD Guidelines for Multinational Enterprises*, http://www.oecd.org/document/39/0,2340,en_2649_34889_1933095_1_1_1_1,00.html (July 19, 2000).

59. *Id.* at 5.

Already, there are indications that law and lawyers are contributing to delays in the resolution of issues raised with NCPs. Documenting specific instances with any degree of rigour is impossible, since the Procedural Guidelines provide expressly for "confidentiality of proceedings"[60] whilst an NCP is engaged in providing good offices where it considers that the issues raised merit further examination. Though the Procedural Guidelines do not have force of law for parties raising issues with an NCP, the relevant provision is clearly directed to the parties[61] and complainants appear generally to have complied with the spirit of this norm.

There are real risks that the effectiveness of the Guidelines, and their potential positive contribution to the corporate social responsibility agenda as a whole, could be held back by a process of 'creeping legalisation'. Examples include:

- When companies whose activities are the subject of complaints to the NCPs seek legal advice on the application of the Guidelines to the instant at issue, holding back speedy resolution of the substantive issues underlying complaints to NCPs may occur.
- When lawyers acting for companies whose activities or operations are the subject of a complaint place a major burden of proof on complainants or on NCPs by putting forward large volumes of paperwork to refute claimants' assertions—in a level of detail that complainants cannot refute without a major investment of resources—and, potentially, legal advice.
- When lawyers acting for companies whose operations are the subject of a complaint NCPs raise arguments that information held by a third party, and that might be relevant to the resolution of a complaint, should not be released since it is potentially relevant to ongoing litigation.
- Any 'creeping legalisation' of the Guidelines by businesses and their legal advisers may act to strengthen the hand of non-governmental organisations who have rejected a 'voluntary only' CSR agenda in favour of work to strengthen corporate accountability—including by campaigning for a new corporate accountability convention. As the Clean Clothes Campaign argues, "[a]lthough [the] guidelines are very weak it is hard to ignore them, because whenever there's an attempt to push for legislation that would hold companies accountable for labor conditions almost every government refers to the OECD guidelines and procedures."[62]

60. *Id.* at ¶¶ 4(a), 5.

61. "At the conclusion of the procedures, if the parties involved have not agreed on a resolution of the issues raised, they are free to communicate about and discuss these issues." *Id.*

62. Clean Clothes Campaign, *Complaining at the OECD*, http://www.cleanclothes.org/legal/oecd.htm (accessed Oct. 25, 2004).

### C. *Litigation that Holds Back Voluntary Corporate Environmental and Social Reporting*

Litigation in California against the sports goods and apparel company Nike has threatened to chill take-up of voluntary corporate environmental and social reporting. In *Nike, Inc. v. Kasky*,[63] California resident and environmental activist Marc Kasky challenged a variety of statements made by Nike over a period beginning in 1996, a time when the company was under sustained attack from a variety of individuals and NGOs over labour practices in its supply chain. Nike responded to these attacks through a variety of communications ranging from press releases to letters addressed to university presidents. In essence, these communications said that Nike products were manufactured throughout the world in accordance with a strict code of conduct, and that they were free from sweated labour.

California consumer protection legislation, recognising the limited resources available to public attorneys-general, enables any California resident, whether she or he has suffered damage or not, to bring an action as a 'private attorney general.' Mr. Kasky claimed, in this capacity, that a number of Nike's statements were false or deceptive, and that, consequently, as false advertising they were not covered by the U.S. Constitution's First Amendment enshrining freedom of speech. Nike cited the U.S. Constitution's First Amendment protection. Initially, the San Francisco Superior Court and the California Court of Appeals dismissed the action, agreeing with Nike that the company's statements were indeed protected by the First Amendment. But in May 2002, the California Supreme Court ruled by a majority of 4-3 against dismissing the action on First Amendment grounds.[64] Key to the court's ruling was its determination that Nike's statements amounted to "commercial speech," because they were directed by a commercial speaker to a commercial audience (consumers of Nike products), making representations of fact about Nike's business operations "for the purpose of promoting sales of its products."[65]

Commercial speech is not subject to the same level of protection as 'political speech' under the First Amendment, and U.S. legislatures are free to prohibit commercial speech that is false or misleading. The consequence is that Nike's statements made in efforts to defend their Asian business practices—in the specific contexts in which they were made—were subject to California's laws on unfair competition and false advertising in the usual way. That, in turn, means that Nike will have breached unfair competition

63. *See generally* 539 U.S. 654 (2003); Goldstein & Howe, P.C., http://www.goldsteinhowe.com/; *select* Go to the Filings in Nike v. Kasky (accessed Oct. 26, 2004).

64. *Kasky v. Nike, Inc.*, 119 Cal. Rptr. 2d 296 (Cal. 2002).

65. *Id.* at 300-01.

law if members of the public are likely to have been deceived by its statements.[66]

Nike indicated that as a result of the California Supreme Court judgment, it had decided "to restrict severely all of its communications on social issues that could reach California consumers, including speech in national and international media."[67] It cancelled release of its annual corporate responsibility report, decided not to pursue a listing in the Dow Jones Sustainability Index, and refused "dozens of invitations . . . to speak on corporate responsibility issues."[68]

Yet, it is far from clear that the tests applied by the California Supreme Court would *necessarily* apply to voluntary company reports or speeches in the same way as Nike's factual statements. The long-term reputational benefits that are among the principal drivers of voluntary company reporting may not be held to have the same nexus with 'promoting sales' as the kinds of defensive factual statements that are at stake in the *Kasky* case.

Business lawyers were quick to point to the risks inherent in company reporting. For example, two analysts with DLA Upstream argued, before the case reached an out of court settlement (which is considered further below), that "[i]f Nike loses, [*Nike, Inc. v. Kasky*] it could mean the end of voluntary CSR reports as they currently exist as they could prove too great a potential liability."[69]

In contrast, very little press coverage of the *Nike* case placed the litigation within the broader context of the corporate responsibility agenda and the public interest in clear and truthful corporate communications.[70] Public perceptions of the 'public interest' surrounding the case, in other words, are likely to have been influenced by press coverage that appears at first blush to have been heavily influenced by Nike's own publicity.

There were substantial risks that if Nike's 'chilling effect' arguments took hold, the case could have an adverse effect on developments in the field of corporate social responsibility overall. In other words, Mr. Kasky's action had the potential to hold back the corporate responsibility agenda

66. Cal. Bus. & Prof. § 17200 (1997). Nike appealed and in January 2003 the U.S. Supreme Court announced that it would review the California Supreme Court's judgment. In an opinion issued in June 2003, the Court dismissed a writ of certiorari on the basis that it lacked jurisdiction, in part because no final judgment had yet been issued by a California court. *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003).

67. *Nike, Inc.*, 539 U.S. at 682 (Kennedy, J., dissenting).

68. *Id.*

69. Stuart Thomson & Sam Hinton-Smith, *U.K. Takes Step Towards CSR Reporting*, Ins. Day (July 23, 2003), available at http://www.stuartthomson.co.uk/articles/csr/.

70. My unscientific reading of the press coverage of the California Supreme Court decision would certainly appear to support the analysis of the U.S. NGO, ReclaimDemocracy, *Major Newspapers Publishing Editorials on Nike v. Kasky*, http://www.reclaimdemocracy.org/nike/ nike _v_kasky_editorial_record.html (accessed Dec. 6, 2004).

when coupled with scaremongering publicity about its chilling effect, and lack of clarity over the territorial reach of the California legislation.[71]

In the litigious U.S., the discovery that companies can be sued—by people who have not suffered damage—over the statements that they make about their social or environmental practices in defence of NGO attacks is bound to set alarm bells ringing; but the case has not gone to trial. No court has ruled directly on how California law actually applies to the facts at issue—only on the extent to which Nike's statements are protected by the First Amendment. And California legislators remain free, as one commentator has suggested, to establish a clear 'safe haven' where right-minded corporate communications can remain free from the threat of litigation.[72]

### D. *Tactical Use of Legal Arguments Holding Back Progress*

A final example of the potential chilling effect of legal advice on the corporate social responsibility agenda concerns the suggestion made by a major U.S. oil company that mandatory transparency over payments made by companies in the extractive sectors could open it to a risk of litigation under the Alien Tort Claims Act.[73] There have been reports that concerns about liability under the Alien Tort Claims Act were cited by ExxonMobil in June 2003 to secure a change in emphasis in the U.K. government-led Extractive Industries Transparency Initiative, from "a compact that would be formally endorsed by companies and governments to a vague set of principles with no bite."[74]

## IX. Joining up Litigation and Corporate Communications

With globalisation, the challenges of legal risk management have become broader, both substantively and geographically. As one in-house counsel writes:

---

71. Now that it has been unleashed, the issues raised are unlikely to disappear. Litigation has already begun in the broadly comparable "happy cows" case in which the animal welfare NGO People for the Ethical Treatment of Animals has brought an action against San Francisco based Milk Advisory Board over adverts showing cartoon cows with the caption "Great cheese comes from happy cows. Happy cows come from California." Center for Individual Freedom, *Boo-Hoo, Moo-Moo*, http://www.cfif.org/htdocs/legal_issues/legal_updates/other_noteworthy_cases/happy_cows_campaign.htm (Dec. 19, 2002).

72. Elliot Schrage, *A New Model for Social Auditing*, Fin. Times (May 27, 2002), available at http://www.cfr.org/pub5083/elliot_schrage/a_new_model_for_social_auditing.php. For a collection of press articles, see http://www.cleanclothes.org/companies/nike02-05-02.htm (accessed Aug. 23, 2004).

73. "The Extractive Industries Transparency Initiative was announced by UK Prime Minister Tony Blair at the World Summit on Sustainable Development in Johannesburg, September 2002. Its aim is to increase transparency over payments by companies to governments and government-linked entities, as well as transparency over revenues by those host country governments." Department for International Development, *News*, "The Extractive Industries Transparency Initiative," http://www2.dfid.gov.uk/news/files/extractiveindustries.asp (accessed Oct. 25, 2004).

74. E-mail from Gavin Hayman, Global Witness (Feb. 27, 2004) (on file with author).

> The 'fire-fighting' lawyer, hidden away in the legal department waiting for assignments from the business people, is a thing of the past. The new-style lawyer is more integrated in the decision making process and more proactive, has a broader perspective of the business strategies and is generally more informed.[75]

Corporate social responsibility forms an important part of the business landscape for this new-style lawyer. That insight has direct consequences for the management of litigation in cases with strong associations with the corporate social responsibility agenda. There is a strong case to be made for a defendant company's legal advisers to develop tailored litigation strategies – so that the company's approach to CSR is demonstrated to be congruent with its approach to litigation.

The body of transnational legal claims against parent companies of multinational corporate groups, in relation to environmental or human rights impacts in developing countries, offer useful case studies for both legal advisers and potential defendant companies. For example, in U.S. litigation against Unocal over its alleged links to human rights abuses by government forces in Myanmar, the company chose to adopt an aggressively defensive external relations strategy. Alongside policy commitments to respect human rights the company issued a series of statements rejecting the allegations, whilst casting doubt on the motives of the claimants' lawyers. In a variety of statements[76] the company asserted that:

> The claims made in the Cristobal Bonifaz law firm press release concerning human rights abuses on the Yadana natural gas project in Myanmar (Burma) in which Unocal holds a financial interest are false, irresponsible and frivolous.[77]
>
> We are confident that no human rights abuses have occurred in the construction or operation of the pipeline. In fact, the company has met with the government on a number of occasions to express our concerns about reports of human rights abuses by the Burmese armed forces. We are absolutely convinced that the presence of Unocal and other companies who follow high ethical standards and modern business practices can have a positive impact on the economic and political life of the people of Myanmar.[78]

---

75. Markus U. Diethelm, *Globalization and the Future of the International Practice of Law from a General Counsel's Perspective of a Multinational Enterprise – A Navigator of Management and Steward of the 'Future of Law'?* in *The Internationalization of the Practice of Law* 75, 79 (Jens Drolshammer & Michael Pfeifer eds., Kluwer L. Intl. 2001).

76. *See generally* Unocal, *The Yadana Project in Myanmar*, http://www.unocal.com/myanmar/ (accessed Oct. 24, 2004).

77. Unocal, *Unocal Statement in Response to Press Release from Law Offices of Cristobal Bonifaz*, http://www.unocal.com/uclnews/96htm/090396b.htm (Sept. 3, 1996). A settlement of the claim "in principle" was announced in December 2004.

78. Unocal, *Unocal Actions Not on Trial in California Case; Company Expects to Be Vindicated of 'Vicarious Liability' Charges*, http://www.unocal.com/uclnews/2002news/061202.htm (June 12, 2002).

Unocal's statements sit uneasily against court findings during the course of the litigation. For example, the Ninth Circuit Court of Appeals judgment of September 18, 2002 in *Doe v. Unocal*[79] included the following passages:

> [T]he evidence . . . suggest[s] that Unocal knew that forced labor was being utilized and that the Joint Venturers benefitted from the practice.[80]
>
> [T]he evidence . . . supports the conclusion that Unocal gave practical assistance to the Myanmar Military in subjecting Plaintiffs to forced labor.[81]
>
> Unocal knew or should reasonably have known that its conduct – including the payments and the instructions where to provide security and build infrastructure – would assist or encourage the Myanmar Military to subject Plaintiffs to forced labor.[82]

The CSR agenda calls for lawyers to have sufficient understanding of the agenda to be able to play a role in preventing these kinds of mismatches. The balancing act is not an easy one. Whilst transparency is a key theme in the corporate social responsibility agenda, factual statements that prove false could, in circumstances, open companies to the prospect of litigation. Yet, silence is an uneasy option from a CSR perspective. Companies whose lawyers are well-attuned to the nuances of the CSR agenda can help their clients to find a middle way—for example through the provision of factual statements about the litigation, and comments on the underlying principles—in this case those concerning the boundaries of company and state responsibility and liability respectively.

## X. Transnational Corporate Accountability Litigation: Implications for Public Interest Lawyers

It is not only practitioners in commercial law firms who face professional dilemmas when defending clients in transnational litigation. Alongside the 'for-profit' commercial law firms, there is another body of lawyers whose work and ethical positions are directly relevant to the corporate accountability and responsibility agendas. This is the body of lawyers who work within 'public interest'[83] law firms. Their role in the emerging body of transnational litigation against parent companies of multinational corporate groups also raises a number of ethical dilemmas.

Plaintiffs in many U.S. Alien Tort Claims Act actions have been represented not by commercial law firms, but by public interest lawyers based

79. *Doe v. Unocal Corp.*, 2002 WL 31063976 (9th Cir. Sept. 18, 2002).

80. *Id.* at 14212 (quoting *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1310 (C.D. Cal. 2000)).

81. *Doe v. Unocal*, 2002 WL 31063976 at 14221.

82. *Id.* at 14227.

83. See discussion of public interest law, *supra* n. 45.

with non-governmental organisations including for example the Center for Constitutional Rights,[84] EarthRights International,[85] and the International Labor Rights Fund.[86] Many of these organisations, with the financial support of large foundations, use the law and courts in both home and host countries to pursue environmental or social justice.

Public interest lawyers may be convinced that litigation offers a powerful way to secure improvements in multinational corporate performance, or that in the absence of a comprehensive multilaterally agreed framework for corporate accountability in 'worst case' circumstances it is important to make the most of the scope for corporate accountability that is offered by existing legal principles. There may also be a hope that adverse publicity and falling share prices that result from such litigation may shame companies into better practice.

NGOs have often campaigned alongside individual legal actions. NGOs or trade unions based in host countries may also work with plaintiffs' lawyers to gather evidence, identify potential plaintiffs, or support community-based groups or individuals involved in 'foreign direct liability' claims. One example is offered by the U.S.-headquartered Center for Economic and Social Rights (CESR), whose aim is to promote social justice through human rights.[87] CESR's Latin America programme, which works to challenge development projects in the Amazon "for lack of accountability and community participation," has been involved in litigation against Texaco under the Alien Tort Claims Act.[88]

## XI. Public Interest Lawyers, Private Rights and Community Impacts

Transnational personal injury claims against parent companies of multinational corporate groups in relation to impacts in developing countries offer sharp insights into a range of professional ethical dilemmas facing public interest lawyers acting for clients drawn from historically poor or marginalized communities in middle and low income countries.

English litigation against Cape PLC, at one time among the world's largest asbestos mining companies, is a case in point.[89] The Cape litigation ultimately involved over 7,500 South African citizens suffering from asbestosis and mesothelioma. The claimants, who were former workers at Cape's South African asbestos mining subsidiaries or members of commu-

84. Center for Constitutional Rights, http://www.ccr-ny.org/v2/home.asp.

85. EarthRights International, http://www.earthrights.org/.

86. International Labor Rights Fund, http://www.laborrights.org/home.html.

87. Center for Economic and Social Rights, http://cesr.org/.

88. *See generally* Centro de Derechos Económicos y Sociales, http://www.cdes.org.ec/quehemos.htm.

89. *See generally* Halina Ward, *Towards a New Convention on Corporate Accountability? Some Lessons from the Thor Chemicals and Cape PLC Cases*, in *Yearbook of International Environmental Law* 105 (Oxford U. Press 2001).

nities around its former mining sites, brought a series of actions seeking damages from the parent company. Since 1989, Cape had had no presence in South Africa, and indeed it no longer carries on asbestos mining operations.

Initially, in 1997, the London based law firm Leigh, Day & Co. issued two writs in London on behalf of five claimants funded through the public funds under the so-called 'legal aid' system. They argued that Cape's South African operations were in fact controlled by Cape in London, and that the parent company knew that its operations risked the health of workers and people in the surrounding communities. Cape argued, under the *forum non conveniens* principle,[90] that the action should have been brought in South Africa and that it would be willing to make itself available to be sued there. For three years, the claimants fought to bring their action in England. It was July 2000 before the House of Lords agreed that they were right to do so. The delay was due to legal arguments over the proper application of the *forum non conveniens* principle. Initially, the Court of Appeal refused to rule in favour of South Africa as the proper legal forum. After this ruling, in 1999, further writs were issued by two English law firms. The claimants now totalled more than 1,500. Once more, Cape argued that the cases were more appropriately brought in South Africa.[91] This time, the Court determined that South Africa was the proper forum. The case progressed to the House of Lords on the issue of *forum non conveniens*. By the time the House of Lords gave its judgment in favour of the claimants, there were over 3,000 claimants. More than 100 had died since initiating their actions. After protracted settlement negotiations, Cape finally agreed to a £7.5 million settlement in March 2003.[92]

Leigh, Day & Co. established offices near to the communities from which its clients were drawn, working in association with two South African law firms. A second English law firm, John Pickering & Co., acted for a smaller number of the claimants—though nonetheless more than 2,000 of

90. The *forum non conveniens* principle, which is widely applied, with some variations, in common law jurisdiction, essentially allows a court to refuse to hear a case where there is some other available legal forum "in which the case may be tried more suitably for the interests of all the parties and for the ends of justice." *Spiliada Mar. Corp. v. Cansulex Ltd.*, [1987] AC 460 (H.L. 1986).

91. Cape's lawyers also made an ethical argument. They argued that Leigh, Day & Co. had known all along that a group action would follow on from the initial action by five claimants, and that its approach to the first two actions had been structured as a tactic to make it easier for the English courts to accept jurisdiction. Leigh, Day & Co. were forced to seek legal representation for themselves as Cape argued that their behaviour amounted to an abuse of the process of the court. In the event, the Court of Appeal was critical of Leigh Day's conduct, but stopped short of judging it an abuse of process.

92. *See* Press Release, Coombs, Pickering and Partners, *End of Struggle for Cape Asbestos Victims*, http://www.minesandcommunities.org/Action/press124.htm (Mar. 13, 2003). An earlier settlement of £21 million had been reached, but Cape failed to make the first payment within the specified time frame and the litigation was revived, leading to the eventual £7.5 million settlement.

an eventual total of some 7,500 clients. Pickering had considerable experience with asbestos litigation in the U.K. It teamed up with a Johannesburg based personal injury firm with small bases in two communities. The litigation attracted considerable media attention, both domestically and internationally. Both firms established links with affected communities at the local level, and both attracted clients through community meetings and printed media. Local radio stations were also used to broadcast information about community meetings around the cases.

The way in which plaintiffs' lawyers discharge their duties to the clients is critically important in setting, and restraining, expectations. In the Cape case many people who suffered from asbestos-related diseases were unable to join the litigation; for example, because they did not work for Cape over the period in question, or because they could not prove their employment history. The exigencies of legal evidence do not always match the ways in which local people order their lives. Law is often unable to take into account the broad social and political background to disputes when determining which facts are legally relevant. In impoverished communities, expectations of the arrival of large sums of money can also attract fraudsters, who are free to attend community meetings to learn about progress with cases and plan ways to rob successful claimants of their compensation.

In South Africa, the situation is further complicated by the legacy of the system of migrant labour in the mining industries. Without considerable outreach work, settlement would be unlikely to reach unidentified foreign migrant workers who worked at Cape's sites and then returned home to the labour-sending areas outside South Africa. The 'hidden' victims remain hidden, unaddressed by the requirements of legal professional ethics.

Even a successful case could not necessarily bring improvements to the quality of life of the vast majority of residents in former asbestos-mining communities. The claimants' lawyers do not have any formal professional ethical responsibilities to the communities from which their clients are drawn, only to those clients themselves. Any creative out of court agreement to provide for environmental remediation in a personal injury action, or for building broader community-based social infrastructure, could only be concluded with the agreement of all the claimants. Ethically, such agreement would demand complete consensus to the extent that it reduced total sums available to compensate claimants in respect of their individual injuries.

Cases like the Cape case offer opportunities for lawyers to work in collaboration with local campaigning organisations and donor agencies or even businesses. Effective collaboration could maximise the impact of the litigation and the publicity that it attracts so as to bring benefits to communities as a whole. As a matter of ethics—if not formal professional ethics—lawyers should seek to maximise the opportunities for bringing community-

level benefits in partnership with other organisations, including local trade union representatives. Indeed, lawyers engaged by Leigh, Day & Co. engaged in a variety of fundraising initiatives for projects around the communities that their clients are drawn from—in one example to raise money for a lung function machine.

## XII. The Challenges of Transcultural Litigation

Lawyers committed to absorbing the relevance of the corporate responsibility agenda into their work would do well to seek to apply insights from the CSR agenda's focus on partnerships in circumstances where they are advising or acting for clients in transcultural human rights, labour or personal injury litigation.[93] The Cape case was not only transnational, but also transcultural in nature. One of the central themes of the CSR agenda concerns processes for stakeholder engagement. Often the focus lies with provision of advice to companies seeking to engage with local communities—sometimes in remote regions where the public sector has little effective reach. Much of the literature and advice that has been developed on stakeholder engagement comes from the distinct sub-theme of 'partnership' among different stakeholders—particularly partnership between businesses and other actors.[94]

Michael Anderson's account of the Bhopal litigation raises the central issue for public interest lawyers succinctly:

> [D]isadvantaged or injured parties may be active participants in the legal process, or they may remain alienated, disempowered "victims" at the mercy of an ambivalent altruism. . . . [I]s the traditional client-lawyer relationship adequate to represent the broader interests which are the real subject-matter of public interest litigation?[95]

A key benchmark of 'responsible' behaviour by lawyers in a North-South transcultural context might thus relate to the extent to which genuine

---

93. *See e.g. Putting Partnerships to Work: Strategic Alliances for Development between Government, the Private Sector and Civil Society* (Michael Warner & Rory Sullivan eds., Greenleaf Publg. 2004).

94. *See e.g.* Jane Nelson, *Business as Partners in Development: Creating Wealth for Countries, Companies and Communities* (Prince of Wales Bus. Leaders Forum 1996); Building Partnerships for Development, *Press Office*, http://www.bpd-naturalresources.org (accessed Aug. 31, 2004); Building Partnerships for Development, *Water and Sanitation Resource Centre*, http://www.bpd-waterandsanitation.org/english/resource.asp (accessed Aug. 31, 2004); University of Cambridge, *Programme for Industry's Postgraduate Certificate in Cross-Sector Partnership*, http://www.cpi.cam.ac.uk/pccp/ (accessed Aug. 31, 2004) (curriculum); AccountAbility, *AA1000 Series*, http://www.accountability.org.uk/aa1000/default.asp (accessed Nov. 3, 2004) (standard for stakeholder engagement developed by U.K. based non-governmental organisation).

95. Michael Anderson, *Public Interest Perspectives on the Bhopal Case: Tort, Crime or Violation of Human Rights?*, in *Public Interest Perspectives in Environmental Law* 153, 154 (David Robinson & John Dunkley eds., Wiley Chancery 1995).

partnerships are developed with local lawyers, and the quality of engagement with clients.

Public interest lawyer Emily Yozell's account of litigation in the U.S. against Standard Fruit by workers at its Costa Rican banana plantations and their families is a further illustration of the case management challenges for plaintiff lawyers in transcultural litigation.[96] Her analysis can in some respects be usefully understood as a rare contribution, from within the legal profession, to the development of the broader 'partnerships' and 'stakeholder engagement' theme of the corporate responsibility agenda as it relates to core business impacts.[97] There is clearly a difference between the relationship that lawyers have with their clients and the relationship between, say, a mining company and local communities. But, understanding Ms. Yozell's piece in this way incidentally serves as a challenge to the corporate responsibility agenda; to broaden the focus of the 'stakeholder engagement' and 'partnerships' themes of that agenda to allow the application of best practice principles in these areas; and to value chain relationships including buyer-supplier relations.

Ms. Yozell draws insights from the *Castro Alvaro* case, which centred on Costa Rican banana workers hired by Standard Fruit. The workers were required to handle dibromochloropropane (DBCP), a pesticide used to kill nematodes in the roots of the banana plants. DBCP can cause sterility in men when used without proper protective measures. Food-related use of DBCP had been banned in the U.S. since the 1970s after U.S. agricultural plant workers had launched an—ultimately successful—action against the Occidental Chemical Company's agricultural products division. The supplier companies, Dow and Shell, continued to export DBCP overseas to Standard Fruit for use in its Costa Rican plantations for two years after the United States Environmental Protection Agency banned food-related use of the chemical.[98] In Costa Rica, Standard Fruit continued to use the product. Thousands of Costa Rican workers were using the chemical with no protection at all.

The workers, and wives living with their husbands' sterility, were referred to a Texan law firm which duly filed a product liability and negligence suit in state courts in Texas, Florida, and California against Dow, Shell and, later, Standard Fruit. The defendants shifted the cases to federal courts and invoked the principle of *forum non conveniens*—that the case

96. Emily Yozell, *The* Castro Alfaro *Case: Convenience and Justice – Lessons for Lawyers in Transcultural Litigation*, in *Human Rights, Labour Rights and International Trade* 273 (Lance A. Compa & Stephen F. Diamond eds., U. of Pa. Press 1996).

97. *See* Jem Bendell, *Growing Pain? A Case Study of a Business-NGO Alliance to Improve the Social and Environmental Impacts of Banana Production* (May 1999) (copy on file with author) (for a case study of a business-NGO partnership directly relevant to corporate responsibility issues in the Costa Rican banana industry).

98. It seems that Standard Fruit had threatened legal action for breach of contract if they failed to do so—a factor which raises substantial issues of legal ethics in its own right.

should have been brought in Costa Rica, not the U.S. At that time, the maximum sum recoverable under Costa Rican law was $1,500. The *forum non conveniens* arguments were ultimately rejected, and in 1992, an outline settlement agreement was reached among the U.S. attorneys for presentation to local lawyers and the plaintiffs.

As Ms. Yozell points out, "[t]he concept of negotiating about one's rights, like the concept of plea bargaining, is utterly foreign to the Costa Rican legal system, and to the culture of the plaintiffs."[99] The cultural challenges that are relevant to case management include differing perceptions of the passing of time; culturally specific constructions of psychological damage; cultural perceptions of sterility; and the incongruity of monetary compensation for the injuries at issue. In cases where plaintiffs' lawyers are acting on a contingency basis the pressure to cut corners in addressing these challenges may be magnified by the lawyers' need to reach a settlement. As Ms. Yozell points out, "[i]t is easier to write a formula for failure than a formula for success in these cases. The formula for failure is simple. Think first world or 'North;' assume your values, experiences, culture, and legal system are (a) universal and (b) best."[100]

## XIII. Lawyers Supporting Unethical Business Practices

In September 2003, the keynote address at the opening ceremony of the International Bar Association's annual conference in San Francisco was given by the chief prosecutor of the newly established International Criminal Court. In his speech, Luis Moreno-Ocampo called on business lawyers to assist in bringing perpetrators of international crimes to account. He highlighted atrocities in the Congo and noted that businesses in 25 countries, including the U.K. and the U.S., stood accused of helping to finance activities of the perpetrators of these crimes through the illegal trade of arms and natural resources, as well as money laundering. "There is a network of lawyers out there able to give information on these countries and to give information to their clients," he was reported as saying. Coverage of the speech in the legal press suggested that it served the incidental effect of bringing home to his audience that "some of the illegal business activities he referred to are likely to have been facilitated by lawyers."[101]

A narrow view of professional ethics in relation to the lawyer's role in business would fail to speak directly to these concerns. As a commentary on SEC activities to implement Section 307 of the Sarbanes-Oxley Act notes:

---

99. Yozell, *supra* n. 96, at 278.

100. *Id.* at 283.

101. John Malpas, *If You're Going to San Francisco*, Legal Week (Sept. 18-24, 2003), available at http://www.legalweek.net.

> There are, essentially, two models of the lawyer's role in business, the Trusted Counselor model and the Legal Enabler model. . . . Counselors act as officers of the court whose job is to prevent clients from falling into crime. When their advice goes unheeded, they withdraw in protest. On rare occasions, they even blow the whistle. The Legal Enabler model, by contrast, is what the average corporate lawyer follows to make a living at the law. Legal Enablers pass no judgment on corporate acts and take no position on the wisdom of business decisions. Instead, they provide morally neutral risk analysis. Their stock in trade is not legal judgment; it is legal rationalization.[102]

The CSR agenda demands Trusted Counselors with a strong sense of their broader societal responsibilities.

Recent discussion in the U.S. on the interplay between legal ethics and corporate responsibility has been heavily dominated by the debate on the implications of the 2002 Public Accounting Reform and Investor Protection Act[103] (Sarbanes-Oxley). Sarbanes-Oxley reflected a formal response to the corporate governance issues associated with the collapse of the Enron Corporation.[104] The Act implicated lawyers and legal ethics in a number of ways, but most directly through section 307, which requires the SEC to adopt rules of professional conduct for lawyers "appearing and practicing" before it on behalf of an issuer of securities.[105] It appears that these rules will preempt conflicting state level rules of ethics.[106]

The SEC's Part 205 regulations, effective from August 5, 2003,[107] now incorporate mandatory 'up the ladder reporting'—namely, reporting on

---

102. *It's About Time: Corporate Responsibility Law Finally Makes Lawyers More Accountable*, http://www.upenn.edu/researchatpenn/article.php?379&bus (Aug. 14, 2002) [hereinafter *It's About Time*].

103. H.R. 3763, 107th Cong. (July 30, 2002) [hereinafter *Sarbanes-Oxley*].

104. *See* Special Issue, *Corporate Transparency, Accountability and Governance*, J. of Corp. Citizenship (Winter 2002) (a series of articles that address these issues in terms of their nexus with the corporate citizenship agenda).

105. *Sarbanes-Oxley*, *supra* n. 103, at § 307. It states

> Not later than 180 days after the date of enactment of this Act, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule –
> (1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and
> (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

106. *See e.g.* LegalEthics.com, *The Intersection of Ethics and the Law*, 08/04/03: An interesting exchange between the Washington State Bar and the SEC, http://legalethics.com (accessed Oct. 26, 2004).

107. 17 C.F.R. § 205 (2003).

actual or potential transgressions to individuals or functions 'higher up' the organisational hierarchy—in circumstances where a lawyer falling within the scope of the provisions "becomes aware of evidence of a material violation" of securities law, breach of fiduciary duty, or similar violation by the issuer or any of its representatives or agents.[108] However, they stop short of requiring immediate direct reporting to the board, incorporating instead a graduated approach.

The SEC postponed providing a rule on 'noisy withdrawal' to outline instead the circumstances in which a legal adviser not receiving a satisfactory response to a 'material violation' should withdraw from acting in defined circumstances; notify the SEC of the withdrawal and disaffirm relevant documents. The rules do, however, permit an attorney to disclose confidential information (relating to the disclosure) to the SEC in certain limited defined circumstances.[109]

Section 307, and the SEC's rules have generated hot debate within the legal profession—both in the U.S. and abroad. Concerns were raised about potential conflicts of interests inherent in the SEC delivering rules to 'regulate the advocate of one's adversary;' tensions between the SEC rules and existing rules of professional conduct; the balance to be drawn between the interests of investors and the interests of issuers;[110] and the impact of the rules on the relationship between lawyers and their clients more widely. Yet one commentator asks, "[w]hy is the legal profession so worried? Because the new law pricks at the heart of a system under which lawyers have always escaped accountability in business cases."[111]

A proactive approach from the community of business lawyers to the promotion of responsible business behaviour as an integral part of legal professional practice could help to enhance the profession's reputation post-Enron at the same time as reflecting a vision of professional ethics that understands the business lawyer's role in its wider social context.

## XIV. Negotiated Settlements: Private Clients or Public Interest?

The post-Enron debate on professional ethics in the U.S. points to a deep underlying dilemma: where the interests of private clients are at odds with the public interest, however defined, how should lawyers act? The private/public interest dilemma for professional ethics has been a particular focus of attention for legal ethics commentators when lawyers negotiate

108. 17 C.F.R. § 205.3 (2003).

109. Memo., O'Melveny & Myers L.L.P., *SEC Adopts Rules to Implement Standards of Professional Conduct for Attorneys under Section 307 of the Sarbanes-Oxley Act*, http://www.omm.com/webdata/content/publications/sec_rules.pdf (Feb. 24, 2003).

110. *See* Richard Hall, *Section 307: The Slippery Slope?*, The European Law. (Dec. 2002/Jan. 2003) (example of discussion in the context of the EU).

111. *See It's About Time*, *supra* n. 102.

resolutions of disputes away from the public stamp of court oversight. As Lax and Sebenius point out, "[i]t is often easy to solve the negotiation problem for those in the room at the expense of those who are not."[112]

Alongside litigation strategies that serve to reveal deficiencies in existing legal principles in the light of contemporary concerns for corporate social responsibility and accountability, a new body of lawyers is now seeking to integrate an understanding of the corporate social responsibility agenda into out of court settlements. Their actions raise new issues about the strained relationship between the values reflected in law and dispute resolution through the courts, and those associated with the corporate social responsibility agenda.

### *A. Saipan*

In 1999, three separate lawsuits were filed in California state and federal courts and in a U.S. federal court on the West Pacific island of Saipan against a number of U.S. clothes retailers and against garment contractors based in Saipan.[113] Saipan is generally exempt from U.S. immigration and minimum wage laws. The legal actions were brought by NGOs and a class of some 30,000 foreign textile workers, most of whom had been brought from China and the Philippines by apparel companies to work in their factories in Saipan. Some workers were forced to pay recruitment fees in their home countries. These fees effectively tied people to their employers in Saipan to pay back the debt.

A first legal action alleged breaches of California state law on unfair business practices on the basis that the defendant companies had falsely advertised their goods as sweatshop free, and aided and abetted violations by their contractors in Saipan of laws against involuntary servitude, as well as other misleading labelling and advertising practices.

A second action was based on federal laws: the Alien Tort Claims Act, the Anti-Peonage Act, which prohibits use of forced labour, and RICO—the Racketeer Influenced and Corrupt Organizations Act. To state a claim, plaintiffs must allege unlawful conduct of an enterprise through a pattern of racketeering activity violating specified "predicate acts," which include involuntary servitude and indentured labour. RICO broadly defines "enterprise" to include "any union or group of individuals associated, in fact, although not a legal entity."[114] The plaintiffs alleged that the defendants' behaviour amounted to a pattern of racketeering activity, which exists when a person commits or aids and abets two or more specified acts that have

112. David A. Lax & James K. Sebenius, *Three Ethical Issues in Negotiation*, 2 Negot. J. 363, 368 (1986).

113. *See generally* Sweatshop Watch.org, http://www.sweatshopwatch.org.

114. 18 U.S.C.A. §§ 1961 et seq. (2003) (RICO).

sufficient continuity and relationship so as to pose a threat of continued criminal activity.

The substantive legal principles at stake in the case have not been tested, since settlement talks began early in the action. By March 2002, agreements had been reached with a total of 19 mainland retailers. And in September 2002, settlements on different and more stringent terms were reached with a further seven U.S. retailers and 23 Saipan based manufacturers. The settlements, billed as worth $20 million in total, received court approval in April 2003, without admission of liability.[115] Alongside agreement on back pay, damages, recruitment fees, and prohibitions on future violations of relevant laws, the settlements are innovative in providing for strict monitoring of conditions in the factories and living quarters, and for incorporating a comprehensive new Saipan Code of Conduct which governs working and living conditions.[116] The provisions of the settlement agreements are far more creative than any adjudicated resolution of the case could have been.

Yet it appears that legal ratification of the settlement may eventually have hampered its potential directly to benefit workers. According to one insider,[117] when some of the defendant companies went bankrupt or failed to sign the agreement, the budget for implementing its monitoring programme was reduced. But the monitoring requirements under the agreement did not change. Changes could not be made without the agreement of all parties, something that nobody was prepared to countenance. As a result, some potential monitoring bodies including the preferred choice of the plaintiffs withdrew, leaving those that remained promising only to do one-day audits with none of the followup inspections and checking of remediation that had marked out the agreement as something special.[118]

### *B. Nike, Inc. v. Kasky*

A second example of an out of court settlement with strong connections to the CSR agenda arises out of the *Nike, Inc. v. Kasky* case. In September 2003, the parties announced that they had arrived at an out of court

115. Jenny Strasburg, *Saipan Lawsuit Terms OKd: Garment Workers to Get $20 Million*, http://www.sweatshopwatch.org/headlines/2003/chronsaipan.html (Apr. 25, 2003).

116. This of course raises the issue of whether, as a matter of professional ethics, lawyers should negotiate settlements that are not faithful to the values reflected in the legal principles that would be at stake were the case to be resolved through the courts. *Cf.* Owen M. Fiss, Student Author, *Against Settlement*, 93 Yale L.J. 1073, 1085 (1983-84) (arguing that "when parties settle, society gets less than what appears, and for a price it does not know it is paying").

117. E-mail from Michael Blowfield (Mar. 1, 2004) (on file with author).

118. One company, Levi Strauss, continued to fight the case, which was voluntarily dismissed in January 2004 alongside a negotiated out of court settlement. SweatshopWatch.org, *Levi's Lawsuit Dropped/Saipan Workers' Case Dismissed in Victory for Clothier*, http://www.sweatshopwatch.org/headlines/2004/levis_suit_jan04.html (Jan. 8, 2004).

settlement.[119] In a joint announcement, the two parties "mutually agreed that investments designed to strengthen workplace monitoring and factory worker programs are more desirable than prolonged litigation."[120] As part of the settlement, Nike agreed to make additional workplace-related program investments totalling $1.5 million. Nike's contribution will go to the Washington, D.C. based Fair Labor Association (FLA) for program operations and worker development programs in three specific areas:

- Increased training and local capacity building to improve the quality of independent monitoring in manufacturing countries;
- Worker development programs focused on education and economic opportunity; and
- Multi-stakeholder collaboration to advance a common global standard to measure and report on corporate responsibility performance among companies.

Though Mr. Kasky brought his action as a 'private attorney general,' the settlement agreement does not appear to be publicly available. The agreement has been criticised on a number of counts, including Nike's existing interest in the Fair Labor Association and the impact of Nike's FLA funding for collaboration to 'advance a common global standard' on efforts to develop globally applicable reporting standards elsewhere. As the general counsel of Domini Social Investments has argued,

> I have concerns about the money going to the FLA, as Nike was a founding member, and my understanding is that they have a significant influence over the FLA's agenda. . . . Part of the FLA money will go toward working on some generally acceptable reporting format on labor issues, which is good in some ways, but the GRI [Global Reporting Initiative] is already out there. . . . I would have preferred to see the money go to GRI to strengthen its labor component. . . . It would be a shame to divert resources and energy from GRI—I would encourage FLA to work with GRI on this.[121]

The settlement does not appear to take the logical—though hard-to-draft—potentially 'win-win' step of requiring Nike to advocate for mandatory reporting standards that could help to define the acceptable boundaries of corporate communications and level the playing field among companies.[122]

---

119. Press Release, Nikebiz, *Nike, Inc. and Kasky Announce Settlement of* Kasky v. Nike *First Amendment Case*, http://www.stanford.edu/~wacziarg/downclass/Nike_press_release.pdf (Sept. 12, 2003).

120. *Id.*; Kasky v. Nike, Inc. *Settled*, http://reclaimdemocracy.org/nike/nike_settles_lawsuit.html (Sept. 12, 2003) (critiquing the settlement agreement).

121. SocialFunds.com, *The Implications of the Nike and Kasky Settlement on CSR Reporting*, http://www.socialfunds.com/news/article.cgi/article1222.html (Sept. 18, 2003) (critique of the settlement agreement).

122. This argument would likely be countered in similar terms to the suggestion that Nike has an interest in seeing the SEC adopt mandatory reporting standards for listed companies, namely,

Two ethical issues arise out of the Nike out of court settlement:

Whether either party ought to have had an ethical obligation to pursue litigation so as to establish a precedent in an area that lacks legal clarity and has the potential to hold back progress in the wider corporate responsibility agenda.

Whether, in precedent-setting litigation with wide public policy implications where the expression of public values through the law is incomplete and unclear, a higher ethical standard should apply, so that a 'private attorney general' should have an obligation to engage in some form of consultation or engagement on the potential impact and implications of an out of court settlement. It seems that there is no publicly available information on how the settlement was arrived at, nor who was involved. Indeed, the parties may well have been bound by the terms of the settlement not to discuss it. The result, in a private attorney general action, is the perverse one that, to use Fiss's words, "when parties settle, society gets less than what appears, and for a price it does not know it is paying."[123]

### C. *Thor Chemicals*

A final example of the interface between professional ethics, negotiated settlements and corporate social responsibility raises the following question: Can legal ethics be expected to provide a stop-gap in those circumstances where failures in statutory drafting open the space for out of court settlements that take effect at the expense of unrepresented third party interests?

In the *Thor Chemicals* case, two separate actions were brought by workers at the site of the South African facility of this small English multinational corporation.[124] The site carried on mercury-related operations, which were said to have resulted in the deaths or injuries of a number of workers there. There was evidence to suggest that the company had intensified its mercury-related operations in South Africa shortly after its mercury-related processes in England had attracted criticism from the English health and safety regulator, the Health and Safety Executive. Workers at the parent company's plant in Margate had been found to have unacceptably high levels of mercury in their urine. Two separate legal actions brought in England by workers at the South African subsidiary were eventually settled out of court for a total of £1.3 million.

A third action was brought in England in February 1998 against the parent company, Thor Chemicals Holdings (TCH), by a further group of twenty-one workers at the South African site. Again, a *forum non con-*

"it's impossible for us to hypothesize in such general terms as to whether or not we'd embrace the current legislative proposals, however vague they might be, without having given them further scrutiny." *Id.*

123. Fiss, *supra* n. 116, at 1085.

124. *See generally* Ward, *supra* n. 89, at 113-122.

*veniens* argument was rejected.[125] By now, the Thor Chemicals Group had completed a demerger, the effect of which was that by March 1997 all but three subsidiaries of TCH had been transferred to a new parent company. TCH was left with just three companies, of which only the South African subsidiary was still trading. As a result of the 1997 demerger, "TCH was deliberately isolated from the resources of the majority of companies within the group to the tune of a sum in excess of £20,000,000."[126]

The Insolvency Act 1986[127] makes provision for challenges by victims of transactions at an undervalue.[128] In such circumstances, the court may make "such order as it sees fit" for protecting the interests of persons who are victims of the transaction if the court is satisfied that it was entered into by him for the purposes of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or otherwise prejudicing the interest of such a person in relation to the claim which he is making or may make. Section 424(2) expressly provides that an application brought by a victim is to be treated as if it were made on behalf of every victim of the transaction. However, neither section specifies how this critically important provision is to be reflected in the responsibilities of claimants—who may in some cases be funded by public monies to bring their claim.

In September 2000, on an interlocutory application under Section 423 of the Insolvency Act 1986, the English Court of Appeal took the view that the demerger may well have been motivated by a desire to put the group's assets beyond the reach of future claimants after the first two actions had settled.[129] The Court of Appeal ordered Thor Chemical Holdings to disclose documents relating to the restructuring and to pay £400,000 into court—effectively a payment on account of a possible future damages award—if it wanted to continue to defend the action.[130] In October, this third action settled out of court for a total sum of £240,000.[131]

Though the claimants in this case were able to create pressure for an out of court settlement by casting doubt on the motives for the group's demerger, South African officials seeking to deal with the remaining mercury wastes were forced to work with its legacy. The Court of Appeal case resulted in orders to disclose documents and for Thor Chemical Holdings to make a payment into court. The court's order itself did not reveal any arguments designed to identify the potential class of victims, nor any effort to

125. This argument had already been rejected in the earlier two cases.

126. *Sithole & Others v. Thor Chems.* [2000] C.L.Y. 316 (Q.B.).

127. Insolvency Act, 1986, c. 45 (Eng.).

128. Defined as "a person who is, or is capable of being, prejudiced by" a relevant transaction. *Id.*

129. *Sithole* [2000] C.L.Y. 316.

130. Greg Dropkin, *UK Judges Block Thor Chemicals Manoeuvre*, http://www.labournet.net/world/0010/thor1.html (Feb. 10, 2000).

131. *See generally* Ward, *supra* n. 89, at 105-43.

take account of the interests of victims other than those who appeared before it. There are still several tons of mercury-containing wastes at the South African site. Environmental legislation in South Africa allows public authorities to oversee a clean-up of the site and then claim back the cost; but the South African government faces the prospect of being unable to recover its costs since the South African subsidiary has very limited assets.

Neither the South African subsidiary nor its parent company—itself renamed Guernica Holdings—have shown inclination to accept responsibility for paying the full costs of remediating the site.[132] At worst, the South African government would themselves need to bring a separate legal action in England. Quite apart from considerations of time limits for bringing such a claim, efforts to trace monies from the demerger would likely, some seven years on, face considerable obstacles. The problem is this: neither the judges in the Court of Appeal case nor the legal representatives of the parties to the action were required to adduce evidence of other potential claimants—even though it was arguably clear at the time to the Court of Appeal that the South African government was a potential claimant. What was perhaps ethically right for the legal advisers in the context of interlocutory proceedings, funded in part by public monies contributed to frustrating the possibility of a remedy for an unrepresented potential victim—the South African government. The out of court settlement exacerbated the effect of this initial gap.

One immediate argument might be that the claimants should have an ethical duty to refrain from settling out of court—or perhaps notifying the remaining class of victims of the potential claim so that they could seek to revive the proceedings. In this case, the basis for a duty to do just this can be found in the relevant legislation itself. The solicitor's duty as an officer of the Supreme Court could be argued to extend to a duty not to frustrate the public interest behind the legislation—to ensure that the class of victims have a remedy—by settling out of court at a point when a potential remedy has clearly become available. However, this formulation of the specific circumstances of the *Thor* case is clearly open to argument since it is not clear that a claim—let alone a claim in England—by the South African government would have fallen within the definition of "a person who . . . may at some time make[,] a claim" when the facts were viewed at the time of the demerger.[133]

As John Murray, Alan Scott Rau, and Edward Sherman eloquently ask, "[t]he structure of dispute resolution processes in society should provide

132. In August 2004, however, a contribution towards the costs of the clean-up was announced.

133. Insolvency Act, 1986, c. 45 (Eng.).

adequate protection for the public interest. But given the role of private negotiation, does it?"[134]

## XV. Corporate Social Responsibility and the Legal Profession: Responses to Date and Outstanding Challenges

The examples of intersections between corporate social responsibility and legal ethics that have been given in this paper raise three central ethical dilemmas again and again. The first concerns the age-old dilemma of the proper balance to be drawn between lawyers' duties to their clients—to act in their clients' best interests—and their duty to serve the interests of society at large. The second concerns the question of the extent to which generally held ethical principles, or the ethic of collegiality among lawyers, indicate a principle of 'voluntary restraint,' so that lawyers should refrain from bringing legal actions that are likely to frustrate efforts elsewhere within the legal profession to drive forward progressive developments in law. The third, itself a subset of the first dilemma, concerns commercial lawyers more specifically: To what extent do commercial lawyers have an ethical or a professional duty to consider the broad societal context in which their clients operate? To what extent is it a lawyer's ethical, if not professional, duty to give advice that maximises the potential for corporate social responsibility strategies and management practices to be sustained?

With few exceptions, the legal profession has not been quick to recognise that there are circumstances in which an understanding of the corporate social responsibility agenda generates powerful calls for commercial lawyers *not* to act, or to act in *different ways* in some of the areas that have long been established as falling within their direct sphere of activity.

---

134. John S. Murray et al., *Processes of Dispute Resolution: The Role of Lawyers* 212 (Foundation Press 1989). They argue that under current codes of ethics, the lawyer has a duty to provide all relevant information to the client, especially information on 'the public interest.' But the client has the final decision. In the *Thor* cases, the clear solution (to continue with the section 423 claim to a conclusion) is balanced by the duty to the Legal Aid Board (which was funding the claimant's case) and the duty to clients who were pursuing a remedy that appeared the best chance to obtain meaningful compensation and who could not necessarily be expected to weigh 'the public interest' above their own emotional and financial needs to secure speedy redress. The question then is the extent to which a 'public interest' based duty in these circumstances should be given priority—particularly the risk thereby simply of creating a route for underscoring the financial interests of lawyers on all sides in prolonging the case. *Cf.* Stephen B. Goldberg et al., *Dispute Resolution: Negotiation, Mediation, and Other Processes* (2d ed., Little, Brown & Co. 1992) (for the balance that has been struck for mediators in the Colorado Council of Mediation Organizations Code of Professional Conduct [1982], paragraph 5 of which argues that "the mediation process, may include a responsibility of the mediator to assert the interest of the public or other unrepresented parties in order that a particular dispute be settled, that costs or damages be alleviated, and that normal life be resumed. Mediators should question agreements that are not in the interests of the public or other unrepresented parties whose interests and needs should be and are not being considered. Mediators should question whether other parties' interests or the parties themselves should be present at negotiations. It is understood, however, that the mediator does not regulate or control any of the content of a negotiated agreement.").

The report of the American Bar Assocation's Task Force on Corporate Responsibility[135] sets out a concept of the corporate lawyer as a promoter of corporate compliance with law. In their words, "[t]he competition to acquire and keep client business, or the desire to advance within the corporate executive structure, may induce lawyers to seek to please the corporate officials with whom they deal rather than to focus on the long-term interest of their client, the corporation."[136] Yet, though the Task Force argues that lawyers who provide legal advice to corporate clients most effectively "fulfill that duty of independent professional judgment by gaining a thorough understanding of the client's objectives, so that they can most readily identify means to achieve those objectives that comply with applicable law,"[137] they do not seize the opportunity offered by their terms of reference to go further and comment on the potential role of lawyers in promoting the highest possible standards in relation to the company's responsibilities to society at large through the corporate social responsibility agenda. To the extent that lawyers are simply facilitators or 'enablers,' "trained to use rules as a means to facilitate an end,"[138] they do not have direct professional responsibilities for setting the goals of societal aspirations. They are backroom players.

Discussion on CSR and the legal profession in Europe scarcely goes further. In a guide on CSR and the legal profession aimed at European business lawyers,[139] the Council of the Bars and Law Societies of the European Union (CCBE) CSR Discussion Group points to an emerging body of legislation and litigation related to the corporate responsibility agenda. It argues that:

> Responsibility for advising on CSR issues has not always been seen as falling to the legal profession. The CCBE believes that this should change. Law is the codification of basic human values. The goal of CSR is to implement these values in corporations, thus CSR develops and functions in a legal framework. There is no other professional who both has such ready access to EU boardrooms, and enjoys legal privilege. As a result, advising on CSR issues should become an everyday matter for corporate lawyers.[140]

---

135. ABA, *Report of the American Bar Association Task Force on Corporate Responsibility* (ABA 2003), available at http://www.ccbe.org/doc/En/guidelines_csr_en.pdf.

136. *Id.* at 14-15.

137. *Id.* at 24.

138. Amanda Perry, *Lawyers in Urban Development: Providing a Means to an End?*, http://elj.warwick.ac.uk/global/issue/2001-2/perry.html (accessed Nov. 8, 2004).

139. CCBE (CSR Discussion Group), *Corporate Social Responsibility and the Role of the Legal Profession: A Guide for European Lawyers Advising on Corporate Social Responsibility Issues* (Sept. 2003), available at http://www.ccbe.org/doc/En/guidelines_csr_en.pdf [hereinafter *CCBE Guide*].

140. *CCBE Guide*, *supra* n. 139, at 8.

The Guide's starting points are a) that the role that lawyers play in applying law—which it says represents a codification of basic human values—equips them well to the task of advising on CSR issues; b) that there may be strong reasons to keep such advice private; and c) that the business lawyer's access to boardrooms is itself a strong reason for lawyers to advise on CSR issues. This third argument depends for its impact and potential contribution critically on the model of corporate social responsibility that is reflected through that access. The second argument—essentially that legal privilege is a distinctive selling point for lawyers to advise on CSR—runs the risk of perpetuating, rather than resolving, the tension between the corporate social responsibility agenda's emphasis on transparency and openness and the inclination of many business lawyers to celebrate confidentiality. And the first argument is also open to question. In fast-moving agendas such as CSR, it is reasonable to suggest that human values are often expressed and evolve more quickly than law is able to catch up. In any event, the role of business lawyers is frequently held to be the essentially passive one of *applying* values already expressed in law—rather than playing a key role in ensuring that emerging values are supported by the application of law. The Guide lends credence to the notion that the *practice* of law has no impact on ability to realise the values that are reflected in *laws*. Furthermore, much of the most heated discussion within the CSR agenda concerns the content of 'CSR values systems.' The agenda is far from having achieved consensus.[141]

The CCBE Guide adds a note of fear. It reminds business lawyers that, when acting as members of, or secretaries to, boards of directors, they need to recognise that negligence may well result in losses of a considerable size for the involved company.[142]

Worryingly, the CCBE Guide does not incorporate any reflection on the potential implications of the corporate social responsibility agenda for legal practice in those areas where tensions may arise. And it includes no reference to any ethical dilemmas that may become apparent when seeking to insert CSR considerations into the practice of law—or vice versa. The Guide assumes that today's professional conduct tools remain adequate for the new and wide-ranging business opportunities that it sketches out. In other words, it does little to ensure that the contribution of the profession to the progressive development of the CSR agenda is a positive one.

Clearly, given the nature of the challenges to professional conduct and ethics that have been outlined in this paper, much remains to be addressed and analysed if the positive contribution of the legal profession to CSR is to be maximised. For example, there is as yet no data on the extent to which

141. For example, there is no consensus on the value of differential protection or support for small enterprise or the informal sector in low-income countries.

142. *CCBE Guide*, *supra* n. 139, at 8.

the kinds of CSR issues outlined in this paper are being picked up by law firms *and* passed on to business clients. Assuming that integration of CSR into legal practice is not yet happening in any systematic way, why not? And if things are to change in this respect, where will the decisive drive come from—the arena of public opinion, pressure groups, government law/regulation, or from clients themselves?

The inside front cover of the December 2002/January 2003 issue of the *European Lawyer* magazine included a full page advertisement by the international commercial law firm Eversheds. Headed, "Ethical Lawyers for an Unpredictable World," the text ran:

> The relationship you have with your lawyers is based on trust. But could you trust lawyers who are willing to:
> offer advice that's based on what you want to hear rather than what you should be hearing?
>
> We think the answer is no. That's why Eversheds is guided by strict ethical guidelines. We won't work for inappropriate clients. We have the ability to say 'no' when necessary. And we provide objectivity in all the advice we give. You can trust Eversheds.[143]

Could Eversheds' advert offer an indication of a way forward? For a community of in-house lawyers, public interest lawyers, and business lawyers to begin to map out a voluntary code of ethics that makes a clear statement that "these are the kinds of lawyers that we are; here is how we view our role in relation to the CSR agenda; here is how we will strive to fulfil it in the context of the advice that we offer. You might not always agree with us, but this is what we'll try to do." Minneapolis is the home both of the Minnesota Principles[144] and a faith-based law school. Might this be a good place to start?

143. Eversheds, *Ethical Lawyers for an Unpredictable World*, The European Law, inside cover (Dec. 2002/Jan. 2003) (advertisement).

144. Center for Ethical Business Cultures, *The Minnesota Principles: Toward an Ethical Basis for Global Business*, http://www.cebcglobal.org/Publications/Principles/MN_PR125IN.htm (accessed Oct. 17, 2004).